120—68.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

No. 1261.

JOHN HAYES, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED OCTOBER 26, 1886.

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INDEX.

	Original.	Print.
Petition for writ of error	1	1
Bond	14	5
Citation (copy)	18	6
Citation (original)	19	6
Proof of service of citation	20	7
Writ of error	21	7
Transcript from Saint Louis criminal court	23	8
Caption	23	8
Call of grand jury	23	8
Indictment	24	8
Arraignment	25	9
Order setting cause for hearing	25	9
Order setting motion for change of venue for hearing	25	10
Affidavits for change of venue	26	10
Order setting cause for hearing, &c	27	11
Order for continuance	27	11
Order setting aside order calling Judge Burton	27	11
Order setting cause for hearing	28	12
Order overruling motion for special venire	28	12
First trial	29	12
Verdict	30	13
Order overruling motion for new trial	31	14
Sentence	31	15
Order granting appeal, &c	32	16
Order setting cause for hearing, &c	33	16
Second trial	34	17
Verdict	35	17
Order overruling motion for new trial	36	18
Sentence	36	18

	Original.	Print.
Bill of exceptions	36	18
Application for change of venue	37	19
Motion to vacate order appointing Judge Burton	38	20
Motion to restrict challenges	39	20
Testimony of John Kelly	39	21
Henry Oberhiede	53	34
Isaac Fisher	61	40
Eliza Mueller	67	44
John N. Frank	69	46
Thomas Puncheon	72	48
Mary Hurley	75	50
Mary Bradshaw	77	51
Florence D. White	78	52
William Hayes	79	53
Charles Boyd	85	57
Mary Galloway	86	58
Susan Dismuke	90	60
John Hayes	96	63
August Winkel	99	65
Thomas Puncheon (recalled)	101	66
John N. Frank (recalled)	103	66
Record of previous conviction	106	68
Instructions given	110	69
Instructions refused	118	72
Motion for new trial	121	74
Motion in arrest of judgment	124	75
Second bill of exceptions	126	76
Motion to vacate order appointing Judge Burton	127	76
Clerk's certificate	128	77
Order for stay	129	77
Order advancing cause	130	78
Motion to advance	130	78
Submission	131	78
Judgment	133	79
Opinion	134	79
Order granting *supersedeas*	136	80
Clerk's certificate	136	80

1 In the matter of the State of Missouri vs. John Hayes.

To the honorable justice of the Supreme Court of the United States:

Your petitioner, John Hayes, respectfully states that at the October term, A. D. 1881, of the St. Louis criminal court, of the city of St. Louis, State of Missouri, he was indicted by the grand jury of said city for murder in the first degree, for shooting and killing one Philip A. Mueller, at said city and State, on the 26th day of August, A. D. 1881; that at the January term, 1885, of said St. Louis criminal court, he was put upon his trial before a jury of twelve men for said offence, and was convicted thereof, as charged in said indictment, and he was sentenced to be hanged; that under the provisions of section 1902 of the revised statutes, of the State of Missouri (of date 1879, vol. 1), he was lawfully entitled on the trial to twenty peremptory challenges of jurors, and the State to only eight such challenges, in this and all similar cases throughout the whole State, and every part and portion thereof, except that, in trials for murder in the first degree, in cities having a population of over one hundred thousand inhabitants, which the city of St. Louis is acknowledged to have then contained, the State, by virtue of the terms of said section, was declared entitled to fifteen peremptory challenges.

2 That by the terms of section 1903 of the revised statutes of the State of Missouri (vol. 1), it was provided that there should be summoned and returned in this and in every criminal cause a number of qualified jurors equal to the number of peremptory challenges allowed to both the State and the defendant, and twelve in addition, making the number of forty-seven in all; that the defendant should not be required to make peremptory challenges before a panel of said number of competent jurors was obtained; that section 1904 of said statutes required a list of the whole number of qualified jurors to be delivered to the defendant, your petitioner, herein, at least forty-eight hours before the trial; that during said term, on the day on which this cause was called for trial, to wit, January 10th, 1885, and before the jury was sworn, your petitioner duly made and filed in court a motion asking the court to limit and restrict the State to eight peremptory challenges of jurors, which motion is in the words and figures following, to wit:

3 In the St. Louis criminal court, January term, 1885.

STATE
vs.
JOHN HAYES.

The said defendant now moves the court to restrict and limit the State's peremptory challenges in this case to the number of eight, and hereby objects to the allowance of a greater number of peremptory challenges on the part of the State, on the ground that so much of section 1902 of the revised statutes of Missouri as permits to the State a larger number of peremptory challenges, to wit, the number of fifteen, is unconstitutional, null, and void.

JOHN HAYES,
By his attorney, JAMES J. McBRIDE.

Which said motion was by the court then and there overruled, and the State was allowed by the court to have and make, and did have and make, fifteen peremptory challenges out of the panel of forty-seven jurors, selected as competent by the State and your petitioner; to which ruling and action of the court your petitioner then and there duly excepted, as appears by the record in said cause.

4 And your petitioner states that afterwards, during said term of court, to wit: On January 17th, 1885, and within the time prescribed by law, he duly filed in said court a motion for a new trial, alleging, amongst others, as reasons therefor the following, to wit:

11th. Because so much of section 1902 of the revised statutes of the State of Missouri as allows to the State fifteen peremptory challenges in this and similar cases is unconstitutional, in that it is in violation of, and inconsistent with, section 53, article 4, of the constitution of the State of Missouri.

12th. Because so much of section 1902 of the revised statutes of the State of Missouri as allows the State in this and similar cases fifteen peremptory challenges is in violation of, and inconsistent with, section 1 of article 14 of amendments to the Constitution of the United States.

JOHN HAYES,
By his attorney, JAMES J. McBRIDE.

5 Which said motion, on January 31st, 1885, was by the court overruled; to which decision of the court overruling said motion the defendant, your petitioner, then and there duly excepted, as appears by the record.

That afterwards, during said term of court, and within the time prescribed by law, your petitioner filed in said court a motion in arrest of judgment, which was by the court overruled; to which decision of the court overruling said motion your petitioner then and there duly excepted.

That thereupon, at the said January term, 1885, of the St. Louis criminal court, your petitioner asked, and was granted, an appeal from the judgment and sentence of said court to the supreme court of the State of Missouri, which then was, and is, the highest court in the State in which a decision and final judgment could be had in the cause, and by that court the judgment of the St. Louis criminal court was affirmed on the 26th day of January, 1886, and sentence of death ordered to be executed on your petitioner on the 5th day of March, 1886.

6 And your petitioner alleges that on the trial of said cause in the St. Louis criminal court, and also in the supreme court of the State of Missouri, the validity of said statute, to wit, section 1902 of the revised statutes of the State of Missouri (vol. 1) was drawn in question as being repugnant to section 53, article 4, of the constitution of the State of Missouri, and also to section 1, article 14, of amendments to the Constitution of the United States, and that the decision and judgment of the said St. Louis criminal court, and also of the supreme court of the State of Missouri, were in favor of the validity of the said statute law of the State of Missouri, as not being repugnant to the Constitution of the United States nor to amendment aforesaid.

7 And your petitioner further says that the decision on the validity

of the said statute of the State of Missouri was necessarily involved in said cause, as being repugnant to the constitution of the State of Missouri, and also to sec. 1, article 14, of amendments to the Constitution of the United States.

And that the said supreme court of the State of Missouri, as appears from the record and from the decision of said court, could not have given the judgment which was rendered by said court without deciding both of said questions, as aforesaid.

8 And your petitioner alleges that manifest error hath been committed to his great damage and peril, as appears from the record and proceedings in said suit, by the said supreme court of the State of Missouri.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

JOHN HAYES,
By his attorney, JAMES J. McBRIDE.

9 In the supreme court of Missouri. October term, 1885.

The STATE OF MISSOURI, RESP'D'T,
vs.
JOHN HAYES, APP'L'T.

Appeal from St. Louis criminal court. Hon. Charles G. Burton, judge.
Opinion of the court.

This cause is here for the second time. The result of the defendant's first appeal and our rulings then made, are reported in 81st Mo., 574, et seq. The defendant is charged in the indictment with the murder of Philip A. Mueller, & after our reversal of the judgment, has been tried again, the trial resulting in his conviction of, & sentence for, murder in the first degree; the second trial resulting in the same way as did the first one.

This appeal presents but two points for consideration; first, whether Judge Burton had jurisdiction to try the cause;

Second, whether section 1902, R. S., 1879, is a valid law.

I. Relative to the first point: The defendant, after the judgment of reversal & and the cause was sent back for a new trial, withdrew his application for a change of venue, & subsequently filed his motion to set aside & vacate the order made by Judge Laughlin, appointing Judge Burton to hear and determine the defendant's application for a change of venue, & to try and determine the cause.

This motion was denied, & properly denied. Section 1881, R. S., 1879, fully authorized the making of the order which the defendant sought to have set aside. Judge Burton, by that order being clothed with jurisdiction, retains that jurisdiction until the final determination of the cause.

This is what the statute says in express terms, & so it was ruled
10 when this cause was here before. State vs. Hayes, supra.

It follows from these premises that the withdrawal of the de-

fendant's application for a change of venue did not divest Judge Burton of the jurisdiction with which he became invested in consequence of the order in that behalf previously made.

2. The second point is equally clear. Section 1902 is valid, & not obnoxious to any objections on the score of being unconstitutional. It is not a special law, because it applies to all cities having a population of over one hundred thousand inhabitants; applies as well to the future as to the present, & in this is plainly distinguishable from the "notary act" discussed in the State ex rel Harris vs. Herman, 75 Mo., 340.

Nor does the section in question impinge upon the constitutional rights of the defendant by reason of giving the State the right, in certain localities, of peremptorily challenging a larger number of persons that it possesses in other localities. Such power on the part of the State does not, under the very terms of the section, diminish a defendant's right to the same number of challenges which he possesses alike in cities or in the country. If the section under discussion had deprived a defendant when tried in a certain locality of the usual number of peremptory challenges, a different question might have been presented, one not necessary to be now considered. This subject of the right of the State & of defendant to peremptory challenges, is fully discussed by a learned author & the cases which he cites. (1 Bishop, Crim. Prac., sec. 940, & cas. cit.) The views here expressed are in accord with those authorities. Having discussed the only errors of which complaint if made, & finding them unfounded, it remains but to say that the judgment is affirmed, & to order that the sentence of the law be carried into execution. All concur.

T. A. SHERWOOD.

STATE OF MISSOURI, *sct.:*

I, Henry W. Ewing, clerk of the supreme court of Missouri, do hereby certify that the foregoing is a true copy of the opinion of said court, delivered in the foregoiug entitled cause, on the 26 day of January, 1886, as fully as the same appears on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court. Done at office, in the city of Jefferson, State aforesaid, this 1 day of February, 1886.

[SEAL.]

HENRY W. EWING, *Clerk,*
By H. Y. SHERWOOD, *D. C.*

11 STATE OF MISSOURI,
City of St. Louis, ss:

I, Patrick M. Staed, clerk of the St. Louis criminal court of the city of St. Louis, State of Missouri, certify that the statements made in the accompanying petition of John Hayes attached hereto for a writ of error from the Supreme Court of the United States to the supreme court of the State of Missouri, concerning the proceedings of the said St. Louis criminal court in the case of the State of Missouri vs. the said Hayes—on a charge of murder, are true—and that the motions and other papers as embodied in said petition are true, full, and complete copies of the original motions and papers as the same appear of record in my office. The testimony of the witnesses on the trial, concerning the homicide, and the instructions of

the court, proceedings relating to a change of venue, the right of
12 the trial-judge to sit in the cause, motions for continuances, &c., are omitted from said petition.

In testimony whereof I hereto set my hand and affix the seal of said court at the city of St. Louis, State of Missouri, this 26th day of February, A. D. 1886.

[SEAL.] PATRICK M. STAED,
Clerk, St. Louis Criminal Court.

13 (Indorsed:) Petition for a writ of error from the Supreme Court of the United States to the supreme court of the State of Missouri.

14 Supreme Court of the United States.

JOHN HAYES, PLAINTIFF IN ERROR,
vs.
THE STATE OF MISSOURI.

Whereas lately, at the October term, 1885, of the supreme court of the State of Missouri, in a suit depending in said court, between the State of Missouri, plaintiff, and John Hayes, defendant, judgment was rendered against the said defendant, and affirming the judgment of the St. Louis criminal court, in which the defendant was convicted of murder in the first degree, at the January term thereof, 1885, and the said John Hayes, defendant, having obtained from the Supreme Court of the United States a writ of error to the supreme court of the State of Missouri to reverse the judgment in the aforesaid suit, and a citation directed to the said
15 plaintiff, the State of Missouri, citing and admonishing it to be and appear at the Supreme Court of the United States, to be holden at Washington City, D. C., the second Monday of October next:

Now, therefore, know all men by these presents, that we, John Hayes, as principal, by his attorney in fact, James J. McBride, and Daniel E. Carroll and James Coff, as sureties, are held and firmly bound unto the State of Missouri, in the full and just sum of two hundred dollars, to be paid to the said State of Missouri, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents.

Sealed with our seals and dated this twenty-second day of March, in the year of our Lord one thousand eight hundred and eighty-six.

Now the condition of the above obligation is such, that if the
16 said defendant, John Hayes, shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

JOHN HAYES, [SEAL.]
By his attorney in fact, JAMES J. McBRIDE.
DANIEL E. CARROLL. [SEAL.]
JAMES COFF. [SEAL.]

Subscribed before me this 22d March, 1886, by James J. McBride, attorney in fact for John Hayes, and by Daniel E. Carroll and James Coff.

Witness my hand and the seal of the circuit court of the United States in and for the eastern district of Missouri, this 22nd day of March, 1886.

[SEAL.] A. P. SELBY,
Clerk of said Court.

I approve this bond.

SAM. T. MILLER.

A true copy:
Attest:
[SEAL.] HENRY W. EWING,
Cl'k, S. C Mo.,
By H. Y. SHERWOOD,
Dep. Cl'k.

17 (Indorsed:) Supreme Court of the United States. John Hayes plaintiff in error, vs. The State of Missouri. Bond. Filed October 4, '86. H. W. Ewing, c'lk, by H. Y. Sherwood, dep. cl'k. Copy.

18 The United States of America, to the State of Missouri, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein John Hayes is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel F. Miller, Associate Justice of the Supreme Court of the United States, this third day of March, in the year of our Lord one thousand eight hundred and eighty-six.

SAM. F. MILLER,
Associate Justice Sup. Court.

Received St. Louis, Missouri, Sept. 22nd, A. D., 1886. A true copy of the above citation.

B. G. BOONE,
Att'y General for State.

19 The United States of America to the State of Missouri, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein John Hayes is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this third day of March, in the year of our Lord one thousand eight hundred and eighty-six.

SAM. F. MILLER,
Associate Justice Sup. Court.

20 On this second day of October, in the year of our Lord one thousand eight hundred and eighty-six, personally appeared before me, the subscriber, Louis Heinbrock, and makes oath that he delivered a true copy of the within citation to B. G. Boone, attorney-general of the State of Missouri, at the city of St. Louis, Missouri, on the 22nd day of September, A. D. 1886.

LOUIS HEINBROCK.

Sworn to and subscribed the 2d day of October, A. D. 1886, before me,
[SEAL.] A. P. SELBY,
Clerk U. S. Cir. Court, E. D., Mo.

21 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Hayes, appellant, and the State of Missouri, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of,
22 or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said appellant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the third day of March, in the year of our Lord one thousand eight hundred and eighty-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

SAM. F. MILLER,
Justice Sup. Court.

23 STATE OF MISSOURI, *set:*

Be it remembered that heretofore, to wit, on the 2nd day of March, 1885, there was filed in the office of the clerk of the supreme court of Missouri a transcript from the St. Louis criminal court in words and figures following, to wit:

STATE OF MISSOURI,
City of St. Louis, ss:

At a term of the St. Louis criminal court begun and held at the city of St. Louis within and for said city on the first Monday of October, the same being the third day of said month, in the year of our Lord one thousand eight hundred and eighty-one, there were present the honorable Henry D. Laughlin, judge of said court; Joseph R. Harris, esquire, circuit attorney of the eighth judicial circuit; Edward A. Noonan, esquire, assistant circuit attorney of the eighth judicial circuit; Isaac M. Mason, sheriff of the city of St. Louis, and Andrew J. Clabby, clerk of said court.

At which term of said court the following among other proceedings were had, to wit:

MONDAY, OCTOBER 3RD, 1881.

This day the sheriff of the city of St. Louis makes return to the court of the names of the persons by him summoned to appear and serve as grand jurors at the present term of the court, and who being duly called, came as follows, to wit, Thomas Dimmock, Edward Quinlwan, Socrates Newman, John H. Schneeberger, Lynne S. Brotherton, Joseph F. Imbs, Francis X. Barada, Edward S. Aloe, David Roden, Louis Hake, jr., Henry Stagg, Isadore Bush, twelve good and lawful men, who, being duly empanneled, are thereupon duly sworn according to law as grand jurors, whereupon the court doth appoint Thomas Dimmock foreman of said grand jury; thereupon the said grand jurors receive their charge from the court, and they retire to consider their present'ents, and such other business that may come before them.

MONDAY, OCTOBER 17TH, 1881.

On this day the grand jury return to the bar, and through their
24 foreman delivered the following indictment as a true bill, to wit:

St. Louis criminal court. October term, 1881.

STATE OF MISSOURI,
City of St. Louis:

The grand jurors of the State of Missouri, within and for the body of the city of St. Louis, now here in court, duly empanneled, sworn, and charged upon their oath, present that John Hayes, late of the city of St. Louis aforesaid, and State aforesaid, on the twenty-sixth day of August, in the year of our Lord one thousand eight hundred and eighty-one, at the city of St. Louis aforesaid, with force and arms, in and upon one Phillip A. Mueller, in the peace of the State then and there being, feloniously, wilfully, deliberately, premeditately, and of his malice aforethought, did make an assault; and that the said John Hayes, with a certain pistol, then and there charged with gunpowder and one leaden

bullet, then and there feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought, did discharge and shoot of, to, at, against, and upon the said Phillip A. Mueller; and that the said John Hayes, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by the force of the gunpowder aforesaid, by the said John Hayes discharged and shot off as aforesaid, then and there feloniously, wilfully, deliberately, premeditately, and of his malice aforethought, did strike, penetrate, and wound the said Phillip A. Mueller in and upon the head of the said Phillip A. Mueller, giving to the said Philip A. Mueller, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said John Hayes, in and upon the head of the said Philip A. Mueller one mortal wound of the depth of six inches and of the breadth of half an inch, of which said mortal wound the said Philip A. Mueller did then and there instantly die. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said John Hayes the said Philip A. Mueller, in the manner and form and by the means aforesaid, feloniously, wilfully, and deliberately, premeditatedly, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

25 EDWARD A. NOONAN.

(Endorsed:) A true bill. T. Dimmock, foreman. Witnesses, Dr. Frank, Eliza Mueller, Isaac Fisher, Henry Oberheide, John Kelly, W. Doyle, Officer Winkel, Officer Punshon, Belle Carr, Rudolph Temme. Filed October 17th, 1881. Andrew J. Clabby, clerk of the St. Louis criminal court.

MONDAY, OCTOBER 31ST, 1881.

THE STATE OF MISSOURI, PLAINTIFF, vs. JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

This day the defendant being brought in custody is brought into court court by the sheriff. Thereupon, on motion of the circuit attorney, said defendant is arraigned upon said indictment, and the same being read to him says he is not guilty as charged therein, and for trial puts himself upon the county, and the circuit attorney does the same, and this cause is ordered continued for want of time to try the same.

And at the November term, 1881, of said court, the following proceedings were had:

TUESDAY, DECEMBER 6TH, 1881.

THE STATE OF MISSOURI, vs. JOHN HAYES. } Murder.

It is ordered that this cause be continued for defendant, and on his motion this cause is ordered set for trial on January 16th, 1882.

And at the January term, 1882, the following proceedings were had, to wi':

TUESDAY, JANUARY 7TH, 1882.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

This day comes defendant and files a notice to the circuit attorney of his intention to apply for a change of venue herein, and the sheriff's return thereon that he had served the circuit attorney with a true
26 copy thereof on January 17th, 1882; thereupon defendant files a petition for a change of venue herein and affidavits of himself in support thereof, and the hearing of said application is by the court laid over to Friday morning next at 9 o'clock, and by consent of each side limited to ten witnesses on the hearing of said application.

FRIDAY, JANUARY 20TH, 1882.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

Now at this day again comes the circuit attorney who represents the State, and the defendant, being in custody, is brought into court by the sheriff, and the attorney of defendant also comes; and the defendant's application for a change of venue on account of the prejudice of the inhabitants of the entire circuit coming on to be heard by the court, and thereupon the defendant files herein the affidavit of himself, supported by that of two other persons not of kin to or counsel for him, which affidavits are in the words following, viz:

In the St. Louis criminal court. January term, 1882.

STATE OF MISSOURI *vs.* JOHN HAYES.

The said defendant, John Hayes, being duly sworn, makes oath and says in aid and support of his application for a change of venue heretofore made and filed in court that the judge of this honorable court will not impartially decide defendant's application for a change of venue on account of the prejudice of the inhabitants of this the eighth judicial circuit of Missouri.

JOHN HAYES.

Sworn to and subscribed before me this 20th day of January, A. D. 1882.

ANDREW J. CLABBY,
Clerk of the St. Louis Criminal Court.

Joseph Furlong and Harry Coons, citizens and residents of the city of St. Louis, Missouri, not being of kin to or counsel for defendant in the

above entitled cause, being duly and severally sworn, on their oaths do say that they believe the matters stated in the above affidavit of John Hayes to be true.

JOSEPH FURLONG.
HARRY COONS.

27 Sworn to and subscribed before me this 20th day of January, 1882.

ANDREW J. CLABBY,
Clerk of the St. Louis Criminal Court.

It is therefore ordered by the court that this cause be set down for trial for Monday, the 30th d'y of the present month of January, at the hour of ten and one half o'clock of that day, and that the honorable Charles G. Burton, sole presiding and acting judge of the twenty-fifth judicial circuit of this State, be and is hereby designated, appointed, and requested to appear and hear said application for a change of venue and to try this cause.

MONDAY, JANUARY 30TH, 1882.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

This day comes the circuit attorney, who represents the State, defendant, being in custody, is brought into court by the sheriff, and the attorney of the defendant also comes; also comes the honorable Charles G. Burton, the sole presiding and acting judge of the twenty-fifth judicial circuit of the State of Missouri, hitherto duly designated, notified, and requested to appear at this term and on this day and hear the petition and application for a change of venue and to try this cause in the place of the regular judge of the St. Louis criminal court, who is, by reason of the affidavits herein heretofore filed by defendant, disqualified to hear said application for a change of venue or try this cause, and thereupon said Hon. Charles G. Burton, judge aforesaid, enters upon the discharge of his duties in respect to hearing said application for a change of venue, and for the trial of this cause. Thereupon the hearing of said application for a change of venue and the trial of this cause is, by the consent of the circuit attorney and the defendant laid over to Wednesday, February 8th, 1882.

THURSDAY, FEBRUARY 2ND, 1882.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

In view of the decision of the supreme court rendered on Monday, January 30th, 1882, in the cause of the State of Missouri, re-
28 spondent, *vs.* Charles F. Kring, appellant, by which the act approved March 26th, 1881, entitled "An act in relation to criminal procedure in the city of St. Louis, and to repeal sections 18 and 19 of chapter 2 of the appendix of the revised statutes of Missouri concerning the criminal court," is declared to be unconstitutional, and that applica-

tion for a change of venue because of the prejudices of the inhabitants must be made to some judge of the circuit court of the city of St. Louis, and not to this court, in all cases pending in this court, it is ordered by the court that the order heretofore entered herein appointing and requesting the honorable Charles G. Burton, judge of the twenty-fifth judicial circuit to appear in t'is court and to hear the application of the defendant heretofore made herein for a change of venue and to try this cause be set aside and held for naught and that said application be stricken from the record and refused for the reason that this court has and had no jurisdiction to hear or determine the same.

WEDNESDAY, FEBRUARY 15TH, 1882.

THE STATE OF MISSOURI
vs.
JOHN HAYES. } Murder in the first degree.

It is ordered that this cause be continued for defendant pending his application to the circuit court for a change of venue, and further ordered that this cause be set specially for trial for March 7th, 1882.

And at the March term, 1882, of said court, the following proceedings were had, to wit:

MONDAY, APRIL 3RD, 1882.

THE STATE OF MISSOURI
vs.
JOHN HAYES. } Murder.

This day comes the defendant, by his attorney, and files his petition for a jury from the county of St. Louis.

TUESDAY, APRIL 11TH, 1882.

THE STATE OF MISSOURI
vs.
JOHN HAYES. } Murder.

This day, the court overrules defendant's application for a special venire of jurors from the county of St. Louis, consisting of persons who reside out of the city of St. Louis.

29 MONDAY, APRIL 17TH, 1882.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

This day comes the circuit attorney, who represents the State, the defendant, being in custody, is brought into court by the sheriff, and the attorney of defendant also comes. Thereupon it is ordered that a jury come, and thereupon come a jury as follows, to wit: Hugh L. Ranken, James J. Adderton, Frank Lawton, Richard Lantry, Walter Parr, E. N. Lane, William Cunningham, Charles A. Tayon, Isaac Richardson, J. C. Snodgrass, Charles Harrington, and Edward H. Semple, twelve good and law-

ful men, who are duly elected, tried, and sworn the issues herein between the State of Missouri, plaintiff, and John Hayes, defendant, well and truly to try, and a true verdict render according to the evidence. Thereupon the trial of this cause proceeds, and the testimony of the witnesses is partly heard, but not being concluded at the hour of adjournment further proceedings herein, are deferred until to-morrow morning.

TUESDAY, APRIL 18TH, 1882.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

This day comes the circuit attorney representing the State, the defendant, being in custody, is brought into court by the sheriff, and the attorneys of defendant also come. Also come the jurors aforesaid. Thereupon the trial of this cause proceeds and the testimony of the witnesses is further heard, and the same being concluded, thereupon the jury receive their instructions from the court, and the argument of counsel being heard and concluded the case is submitted to the jury for their verdict in the premises, and they retire to consider thereof in charge of a deputy sheriff, who has been duly sworn to keep them together in the rooms set apart for the juries of this court, and not permit any one to speak or communicate with them nor do so himself, unless by order of court or to ask them if they have agreed upon a verdict.

WEDNESDAY, APRIL 19TH, 1882.

30 THE STATE OF MISSOURI, PLAINTIFF, *vs.* JOHN HAYES, DEFENDANT. } On indictment for murder in the 1st degree.

This day comes the circuit attorney who represents the State, the defendant, being in custody, is brought into court by the sheriff, and the attorneys of defendant also come, and the jurors aforesaid being agreed among themselves upon a verdict herein are conducted into court by the officer having them in charge, and in presence of defendant render the following as their verdict, to wit: The State of Missouri vs. John Hayes; on indictment for murder in the first degree; we, the jury in the above entitled cause, find the defendant guilty of murder in the first degree as charged in the indictment.

EDWARD H. SEMPLE,
Foreman.

FRIDAY, APRIL 21ST, 1882.

THE STATE OF MISSOURI *vs.* JOHN HAYES. } Murder.

This day comes defendant, by his attorney, and files his motion for a new trial herein, and said defendant is allowed until the first day of the May term, 1882, to file affidavit in support thereof.

WEDNESDAY, APRIL 26TH, 1882.

THE STATE OF MISSOURI
vs.
JOHN HAYES. } Murder.

Supplemental motion for a new trial this day filed by leave of court.

And at the May term, 1882, the following proceedings were had, to wit:

MONDAY, MAY 1ST, 1882.

THE STATE OF MISSOUUI
vs.
JOHN HAYES. } Murder.

Upon stipulation this day filed the defendant is further granted until May 8th, 1882, to file affidavit in support of motion for a new trial herein.

FRIDAY, MAY 5TH, 1882.

THE STATE OF MISSOURI
vs.
JOHN HAYES. } Murder.

Affidavits in support of motion for a new trial this day filed.

MONDAY, MAY 22ND, 1882.

THE STATE OF MISSOURI
vs.
JOHN HAYES. } Murder.

31 Affidavits on behalf of the State this day filed, and, by consent, one week further time granted to file additional affidavits herein.

And at the July term, 1882, the following proceedings were had, to-wit:

TUESDAY, AUGUST 1ST, 1882.

THE STATE OF MISSOURI
vs.
JOHN HAYES. } Murder.

This day the court, having considered the motion for a new trial herein, and being thereof fully advised, doth overrule said motions, the defendant being present at the time.

SATURDAY, AUGUST 5TH, 1882.

THE STATE OF MISSOURI
vs.
JOHN HAYES. } Murder.

This day comes t'e defendant, by his attorney, and files his motion in arrest of judgment herein.

And at the October term, 1882, no proceedings were had, owing to the illness of Hon. Henry D. Laughlin, judge.

And at the November term, 1882, the following proceedings were had, to wit:

MONDAY, NOVEMBER 13TH, 1882.

THE STATE OF MISSOURI, PLAINTIFF, vs. JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

This day comes the circuit attorney, who represents the State, and the defendant, being in custody, is brought into court by the sheriff, and the attorneys of defendant also come. Thereupon the court, having considered the motion in arrest of judgment herein, and being thereof now fully advised thereof, doth overrule said motion. Thereupon said defendant, John Hayes, is demanded by the court if he has or knows anything to say why the court should not now proceed to pass sentence of death upon him in accordance with the verdict heretofore rendered against him, and having nothing to say except that which he hath before said, it is, therefore, considered and adjudged by the court that said defendant, John Hayes, for his offence of murder in the first degree, as charged in said indictment and in pursuance of the verdict heret'fore rendered against him, be taken from this place to the place whence he came, there to remain in custody until Friday, the 29th day of December, 1882, on which day he be
32 taken to the usual place of execution in the city of St. Louis, and there, on said Friday, the 29th day of December, 1882, between the hours of six and eleven o'clock in the forenoon of said day, he be hanged by the neck until he be dead. And it is ordered that the clerk of this court make out a warrant forthwith, commanding the sheriff of the city of St. Louis to carry this judgment and sentence into execution. Thereupon defendant prays an appeal from the judgment here rendered against him to the St. Louis court of appeals, and the court doth grant said appeal.

TUESDAY, DECEMBER 5TH, 1882.

THE STATE OF MISSOURI vs. JOHN HAYES. } Murder.

Now at this day, on motion of the attorney of defendant, it is ordered by the court that the appeal heretofore granted defendant shall operate as a stay of execution until said cause shall be heard in the St. Louis court of appeals.

MONDAY, DECEMBER 11TH, 1882.

THE STATE OF MISSOURI vs. JOHN HAYES. } Murder.

This day comes defendant, by his attorney, and files his bill of exceptions herein.

THURSDAY, SEPTEMBER 4TH, 1884.

THE STATE OF MISSOURI
vs.
JOHN HAYES. } Murder.

Mandate of the supreme court of Missouri reversing the judgment of the court of appeals and the St. Louis criminal court and remanding this cause is this day filed.

And at the July term, 1884, of the St. Louis criminal court the following proceedings were had, to wit:

SATURDAY, OCTOBER 4TH, 1884.

Ordered, that all motions and causes not otherwise disposed of be continued to next term of court.

And at the October term, 1884, of said court the following proceedings were had, to wit:

SATURDAY, NOVEMBER 1ST, 1884.

Ordered, that all motions and causes not otherwise disposed of
33 be continued to next term of court.

And at the November term, 1884, the following proceedings were had, to wit:

TUESDAY, DECEMBER 16TH, 1884.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

This day comes the honorable Charles G. Burton, sole acting and presiding judge of the twenty-fifth judicial circuit of this State, heretofore designated, appointed, and requested to appear and hear defendant's application for a change of venue and to try this cause, as appears more fully of record on page 398, Record Book number 22 of the St. Louis criminal court. Also come the circuit attorney and Charles P. Johnson, esquire, representing the State, and the attorney of defendant also comes. Thereupon this cause came on for hearing before said honorable Charles G. Burton, acting and presiding as judge. Thereupon by leave of court defendant, by his attorney, withdraws his petition for a change of venue herein. The State announcing "ready" for trial, and defendant, by his attorney, announcing that he is not ready and petitioning for a continuance herein, it is therefore ordered by the court that this cause be continued for said defendant, the State consenting thereto. It is further ordered by the court that this cause be especially set for trial on Monday, January 5th, A. D. 1885, in the ensuing January term of this court.

And at the January term, 1885, of said court the following proceedings were had, to wit:

MONDAY, JANUARY 5TH, 1885.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

This cause came on this day to be heard before honorable Charles G. Burton, acting and presiding as judge. Thereupon came the circuit

attorney representing the State, the defendant, being in custody, is
34 brought into court by the sheriff, and the attorney of defendant also comes. It appearing to the court that defendant by his attorney has filed a motion to set aside, vacate, and annull the order heretofore made, requesting, designating, and appointing honorable Charles G. Burton to try and determine said cause and to hear and determine defendant's application for a change of venue and the court being sufficiently advised in the premises doth overrule said motion.

SATURDAY, JANUARY 10TH, 1885.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

This day comes the honorable Charles G. Burton, acting and presiding as judge, also comes the circuit attorney representing the State, the defendant, being in custody, is brought into court by the sheriff, and the attorney of defendant also comes. Thereupon defendant, by his attorney, files his motion to limit the State to eight peremptory challenges herein, and the court being sufficiently advised in the premises doth overrule said motion. Thereupon it is ordered that a jury come for the trial of this cause; there came the following jury, to wit: Frank Roseman, Joseph Besse, Jacob H. Penn, Edward Reeves, William L. Reynolds, Christain Schmitt, John H. Brandon, William P. Barlow, J. F. Barth, Theophile Hertzog, Charles Seavers, and Charles J. Brooks, twelve good and 'awful men who are duly elected, tried, and sworn the issues herein between the State of Missouri, plaintiff, and John Hayes, defendant, well and truly to try and a true verdict render according to the evidence. Thereupon the trial of this cause proceeds and the testimony of the witnesses is partly heard, but not being concluded at the hour of adjournment, further proceedings herein are deferred until next Monday morning.

MONDAY, JANUARY 12TH, 1885.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

This day again comes the honorable Charles G. Burton, acting and presiding as judge, also comes the circuit attorney representing the
35 State, the defendant, being in custody, is brought into court by the sheriff, and the attorney of defendant also comes; also comes the jurors aforesaid. Thereupon the trial of this cause is resumed and the testimony of the witnesses is further heard, and upon the conclusion of the same, further proceedings herein are deferred until to-morrow morning.

TUESDAY, JANUARY 13TH, 1885.

THE STATE OF MISSOURI, PLAINTIFF, *vs.* JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

This day again comes the honorable Charles G. Burton, acting and presiding as judge, also comes the circuit attorney representing the

State, defendant comes into court in the custody of the sheriff, and the attorney of the defendant also comes; also comes the jurors aforesaid. Thereupon the trial of this cause is resumed, and the jury having received their instructions from the court, thereupon the argument of counsel is heard, and upon the conclusion of the same the case is submitted to the jury for their verdict in the premises, and they retire to consider thereof, in charge of a deptuy sheriff who has been duly sworn to keep them together in the room set apart for the juries of this court, and not permit any one to speak or communicate with them nor do so himself unless *gy* order of court, or to ask them if they have agreed upon a verdict; and the said jurors agreeing upon a verdict herein are conducted into court by the officer having them in charge, and in presence of defendant render the following as their verdict, to wit: State of Missouri vs. John Hayes, on indictment for murder in the first degree; we, the jury in the above entitled cause, find the defendant guilty of murder in the first degree as by the indictment he stands charged.

W. P. BARLOW,
Foreman.

SATURDAY, JANUARY 17TH, 1885.

THE STATE OF MISSOURI
vs.
JOHN HAYES. } Murder.

This day comes the defendant, by his attorney, and files his motion for a new trial herein.

SATURDAY, JANUARY 31ST, 1885.

THE STATE OF MISSOURI, PLAINTIFF,
vs.
JOHN HAYES, DEFENDANT. } On indictment for murder in the first degree.

36

This day comes the honorable Charles G. Burton, acting and presiding as judge, also comes the circuit attorney representing the State, defendant, being in custody, is brought into court by the sheriff, and the attorney of the defendant also comes. Thereupon the motion for a new trial herein is by both parties submitted to the consideration of the court, and the court being sufficiently advised in the premises doth overrule said motion.

Thereupon comes defendant, by his attorney, and files his motion in arrest of judgment herein, and said motion being submitted by both parties to the consideration of the court, and the court being sufficiently advised in t'e premises doth overrule said motion. Thereupon said defendant is demanded by the court if he has or knows anything to say why the court should not now proceed to pass sentence of death upon him in accordance with the verdict heretofore rendered against him; and saying that which he hath to say, it is therefore considered by t'e court that said defendant, John Hayes, for his offence of murder in the first degree and in pursuance of the verdict heretofore rendered against him, be taken from this place to the place whence he came, there to remain in custody of the sheriff until Friday, the twentieth day of March, A. D. 1885, on which day he be taken to the usual place of execution in the city of St. Louis, and there on said Friday,

the twentieth day of March, A. D. 1885, between the hours of six and eleven o'clock in the forenoon of said day he be hanged by the neck until he be dead. And it ordered by the court that the clerk of this court make out a warrant commanding the sheriff of the city of St. Louis to carry this judgment and sentence into execution. Thereupon comes defendant, by his attorney, and files his bill of exceptions herein, as follows, to wit:

In the St. Louis criminal court, January term, 1885.

STATE OF MISSOURI
vs.
JOHN HAYES. } Murder in the first degree.

37 Be it remembered that on the 16th day of December, 1884, and preliminary to the trial of this cause, the Hon. Charles G. Burton, judge on the twenty-fifth judicial circuit of the State of Missouri, then being on the bench and acting as judge of the St. Louis criminal court, in this behalf the following proceedings were had, to wit:

Defendant on said day by leave of court withdraws his application for a change of venue on account of the prejudice of the people of the 8th judicial circuit filed January 17th, 1882, while the Hon. Henry D. Laughlin was acting as the lawfully elected and qualified judge of said criminal court, and which said application for change of venue was still pending on said 16th day of December, 1884. Said application is as follows:

In the St. Louis criminal court, January term, 1882.

STATE OF MISSOURI
vs.
JOHN HAYES.

The said defendant, John Hayes, comes and petitions this honorable court to order the removal of said cause for trial and determination from this the eighth judicial circuit of the State of Missouri to some other judicial circuit of said State because the inhabitants of the entire eighth judical circuit are so prejudiced against him that he cannot get or obtain a fair trial of said cause therein.

(Signed) JOHN HAYES.

Sworn to and subscribed before me this 17th day of January, 1882.

A. J. CLABBY,
Clerk.

John Hayes, the above named defendant, being duly sworn makes oath and says that the facts stated in the above and foregoing petition on which he bases his application for a change of venue have first come to his knowledge since the last preceding continuance of this cause.

JOHN HAYES.

Sworn to and subscribed before me this 17th day of January, A. D. 1882.

ANDREW J. CLABBY,
Clerk.

That afterwards, to wit, on the 5th day of January, 1885, Judge Burton having assumed the bench as judge of the St. Louis criminal
38 court in this behalf, the defendant filed in court a motion to vacate the order entered of record at the January term, 1882, whereby he was appointed by Judge Laughlin to hear defendant's application for a change of venue and to try this cause, which said motion is as follows, to wit:

In the St. Louis criminal court, January term, 1885.

STATE
vs.
JOHN HAYES.

Now, at this day, comes the said defendant and by his attorney moves the court to set aside, vacate, and annul the order heretofore made by this court at the January term, 1882, requesting, designating, and app'inting Judge Burton, of the 25th judicial circuit of the State of Missouri, to try and determine said cause, and to hear and determine defendant's application for a change of venue then pending, because said application for a change of venue has been withdrawn, as appears by the records of this court and because further the honorable Henry D. Laughlin, then judge of this court, who was rendered disqualified to try said application for a change of venue, is nom longer judge of this court, and the reason for Judge Burton's appointment no longer exists.

JOHN HAYES,
By his attorney, JAMES J. McBRIDE.

On the said 5th day of January, 1885, defendant, by his counsel, presented said motion to the court, Judge Burton being on the bench, for its action thereon, and the same was overruled by the court; to which said ruling the defendant, by his counsel, then and there at the time duly excepted.

That on the 10th day of January, 1885, after a list of the jurors who had been found by the court to be qualified to sit as such in the case, to wit, forty-seven in number, had been delivered to the defendant more than forty-eight hours, and before the peremptory challenges for the State had been made, the defendant, by his counsel, filed his written motion in court (Judge Burton sitting in the cause), whereby he moved the court to limit and restrict the State's peremptory challenges to eight and no more, and objected to the State being allowed to make more than eight
39 such challenges from the list of qualified jurors for the reasons in said motion stated, and for the additional reason that so much of section 1902 of the revised statutes of the State of Missouri as allows the State fifteen peremptory challenges in this and similar cases is in violation of section 1, article 14, of amendments to the Constitution of the United States, which motion is as follows, to wit:

In the St. Louis criminal court, January term, 1885.

STATE
vs.
JOHN HAYES.

The said defendant now moves the court to restrict and limit the State's peremptory challenges in this case to the number of eight, and hereby

objects to the allowance of a greater number of peremptory challenges on the part of the State, on the ground that so much of section 1902 of the revised statutes as permits to the State a larger number of peremptory challenges, to wit, the number of fifteen, is unconstitutional, null, and void.

JOHN HAYES,
By his attorney, JAMES J. McBRIDE.

That at the said time and before the State's peremptory challenges were allowed or made, the defendant, by his counsel, presented said motion to the court for its action thereon, who overruled the same, and permitted the counsel for the State to make, and said counsel did make and have, against the protest and objection of the defendant, fifteen peremptory challenges out of the list of forty-seven qualified jurors to which ruling and action of the court the defendant, by his counsel, then and there at the time duly excepted.

And afterwards, to wit, on the tenth day of January, 1885, and following, a jury being sworn and empannelled the following proceedings were had in said cause, to wit:

The following named witnesses and testimony were introduced on the part of the State:

Testimony for State.

JOHN KELLY, being sworn, testified:

Direct examination, by Mr. JOHNSON:

My name is John Kelly. My business, an hostler. I am engaged at the Union Stables. I remember the killing of Philip Mueller, in August, 1881. I was then employed at the same stables that I am now. The Union Stables are west of Grand avenue, on Kossuth avenue. The saloon and boarding house that Mueller kept and the stables are in the same block. In August, 1881, I was hostler at the same place as I am now. I was boarding at Mueller's, Philip Mueller's. I was boarding there since September, 1880—September previous to that. I had known Mr. Philip Mueller since September, 1880; he had a family consisting of a wife and three children. I remember the day that Mueller was killed. I was in the saloon the day that Mueller was killed. It was half-past eleven anyhow when I went into that saloon, may be afterwards. There was probably 3 or 4, 5 may be, in there when I went in there; I did not pay any particular attention to the number of persons that was in there; just merely went in there. When I went in I went to a table to get a paper; I took a seat at the south side of the bar-room. [Plat of scene of alleged homicide handed witness. Witness describes it, stating:] The ice box was at the west end of the counter [indicating], Mr. Hayes was about here [indicating], and Mr. Mueller was here [indicating]; I was sitting back by this table [indicating]. [Witness corrects the names of the streets as written on the plat, saying:] That was about the location of the two men [indicating]; here is Kossuth avenue here; you have the thing reversed; you haven't the counter running parallel with Kossuth avenue; you have it running parallel with Grand avenue. The counter run east and west, on the northern side of the saloon. The grocery store is north of that.

There was a doorway leading from the saloon into the grocery. The west end of the counter was near the doorway leading from the saloon into the grocery. There was an ice box at the west end of the counter. There was a lunch set in the east end of the counter. The east end of the counter was in the form of an L; I can't exactly say how many tables were
41 in the saloon; there was either three or four. I came in the saloon from Grand avenue from the corner. The door that I came in was open. It is a double door. When I came in there and took my seat Mr. Mueller was behind the counter. His wife was also behind the counter. Mr. Mueller was not doing anything behind the counter when I went in. Mrs. Mueller was not doing anything. Mr. Hayes was in there at the time I took my seat to read the paper; he was standing outside of the counter, in the bar-room.

Q. Just state to these gentlemen what you heard and saw from the place you were seated at the time; tell it so that these gentlemen can hear it.

A. Well, when I went Mr. Mueller and his wife were inside the counter, behind the bar, and Mr. Hayes was outside, and whilst I was engaged in getting the paper—the morning paper—it seems that Mueller went into the store-room and Hayes he hollered for Mueller and Mueller came out and asked what he wanted. He said he wanted a glass of beer.

Q. You say when he went into the other room he hollered for Mueller. Do you know the language he used in hallooing for him?

A. He just merely said "Oh, Mueller."

Q. At that time where was Hayes standing?

A. He was standing at the bar.

Q. What then did Mr. Mueller do?

A. He came right out of the grocery store and asked him, "Hayes, what do you want?"

Q. Where did he, Hayes, go? Did he go into the bar-room or behind the counter?

A. He did not change his position.

Q. I mean Mr. Mueller.

A. He went behind the counter.

Q. *Q.* What did he ask him?

A. He asked Hayes what he wanted. He said he wanted a glass of beer. Mueller told him he could not have it; he had beer enough and he would not give him any more.

Q. Well, what then was said.

A. Well, there was some words passed between them, but I can't recollect now.

Q. Well, what was next? Then what was said?

A. They had a few words about the beer, but I can't remember exactly remember the words that was said.

Q. Then what did Mr. Hayes say, if anything?

A. He put his hand to his hip pocket and pulled a revolver out—a pistol.

42 Q. What did he do then?

A. Shot Mr. Mueller.

Q. What did he do in the first place?

A. Nothing.

Q. What was Mr. Mueller doing at the time?

A. He was after wiping the counter and he was wiping his hands with the cloth that he wiped the counter with?

Q. Please repeat that so each can hear it?

A. *A.* He was after wiping the counter and then he commenced to wipe his hands with the cloth that he had wiped the counter with.

Q. After that time what did Hayes do?

A. He shot him.

Q. State how he shot him?

A. He raised his hand and shot him [indicating].

Q. Raised his hand from where. Where did he have his hand?

A. He had it laying on the counter.

Q. (By Mr. McBRIDE). Who had?

A. Mr. Hayes.

Q. (By Mr. JOHNSON). Will you show us here [the railing around the clerk's desk]. Say that this is the counter [indicating], will you show us the position of Mr. Hayes and how he had his hand laying on the counter at the time he raised and shot Mr. Mueller. Just step here and do it?

A. He raised his hand on the counter that way [indicating], and he said he had a pop.

Q. What had he in his hand at that time?

A. A pistol.

Q. What was the last word that Mr. Mueller said that you remember just as Mr. Hayes raised the pistol and shot him?

A. There was a kind of a lull of may be a couple of seconds, then there was no words spoken.

Q. Do you remember now or have you any recollection of the last words that passed between them before the shot was fired?

A. The only words that passed between them was one demanded the glass of beer and the other refused it.

Q. When Mr. Hayes raised his hand and fired did he say anything at that time?

A. Not that I know of or remember.

Q. Could you tell how long he had his hand and pistol laying on the counter that way before he raised it and shot?

A. It was only a short space anyhow.

Q. Where was Mrs. Mueller standing at the time the shot was fired?

A. She was standing at the corner of the ice box.

Q. Which direction would that be, to the west or east?

A. The north; north of the ice box.

Q. But would it be east or west of Mr. Mueller?

A. It would be west of Mr. Mueller; he was standing east of her.

43 Q. State to these gentlemen the effects of the firing of the shot, if you saw what the effects were; what the effect of that shot was on Mr. Mueller.

By the COURT:

Q. How far apart were they when the shot was fired?

A. They were only at each side of the counter at the time the shot was fired; almost abreast of each other at t'e counter.

By Mr. JOHNSON:

Q. Can you tell us whether they were farther or nearer than you are to the judge there?

A. The counter divided them.
Q. Where did the shot take effect on Mr. Mueller?
A. It took effect between the left eye and his ear.
Q. Indicate on your face where it was?
A. As near as I can come to it [indicating].
Q. State what the further effect was of the shot on Mr. Mueller; what he did, if anything.
A. After that, I guess, he didn't do much.
Q. What did he do, if anything?
A. He fell back.
Q. Where did he fall?
A. Fell east.
Q. Then what occurred; what did you do?
A. I happened to get out.
Q. What did you do?
A. I say I got out of the saloon.
Q. And that was the transaction as you saw it?
A. Yes.
Q. Is there anything else that you saw there?
A. No; that I remember of.
Q. What distance was Mr. Mueller from his wife at the time the shot was fired?
A. He could not be over three or four feet.
Q. Did you see whether or not Mr. Mueller was dead?
A. He was dead when I got back again.
Q. Where did you go?
A. I went over to the police station.
Q. Whereabout is the police station?
A. It is on Grand avenue.
Q. How far from this place of Mr. Mueller's?
A. I don't think it is over three blocks; not so much, may be.
Q. How long were you going to the police station and getting back?
A. It didn't take a quarter of an hour any how.
Q. It did not?
A. Not over that.
Q. Did you see Mr. Mueller then?
A. I saw him when I came back.
Q. Where was he?
A. He was lying inside the counter.
Q. Was he dead or alive?
A. He was dead then.
Q. What became of Hayes, or what did Hayes do immediately after firing the shot?
A. I could not tell; I got out as soon he fired that shot, a few seconds afterwards.
Q. When you got back did you see anything of Hayes?
A. No.
44 Q. This occurred in the city of St. Louis.
A. Yes, sir.
Q. This State?
A. Yes, sir.

Q. Do you remember, can you remember, now, any expressions that were used by either Hayes or Mr. Mueller; anything about a pistol?

A. No; there was only very few words passed between them?

Q. Well, do you remember anythin', any further words in regard to a a pistol, or the beer, or anything of that kind besides what you have stated?

A. No.

Q. Leat me ask you, do you remember of Mr. Mueller saying—I desire to call your attention to it—Mr. Mueller saying anything to Hayes at the time he laid his pistol on the counter?

A. Well, he told Hayes, says he, "Hayes, put your pop up; I am not afraid of it."

Q. What time was that said?

A. When he refused him for the glass of beer.

Q. Where was Hayes' pistol at that time?

A. Well, he had his hand laying on the counter, and the pistol in the palm of his hand.

Q. How soon after Mr. Mueller made that statement, "Put your pop up; I am not afraid of it," was it when he raised his pistol and shot him?

A. It could not be very long; it was a very short time anyhow.

Q. Was there anything else passed between them?

A. I don't remember anything else that passed between them?

Q. Was there any other words passed between them?

A. Well, there was some words previous to that?

Q. Previous to that? But I mean at the time?

A. Not that I remember of.

Q. Had you seen Hayes in there before?

A. Yes, sir.

Q. Before this occurrence?

A. Yes.

Q. When?

A. Oh, it was quite a while before that when I seen him in there.

Q. How long before this occurrence was it that you saw Hayes in that saloon before?

A. Well, the winter before he was a good deal——

Q. No, I am speaking of this day; did you see him in there?

A. I could not tell.

Q. You knew Hayes?

A. Yes.

Q. What kind of a pistol was it, as you saw it?

A. It looked like a nickel plated one.

Q. A single barrel or a revolver?

A. I cannot tell.

Q. Could you tell whether it was a revolver or——

A. Well, it looked like a revolver, but I cannot say whether it was or not.

Cross-examination by Mr. McBRIDE:

Q. Did you make that plat that you examined or looked at a
45 minute ago?

A. No; I did not make it; I looked at it but I did not make it.

Q. Did you ever see it before to-day?

A. No; not that I know of.
Q. Is it correct?
A. Oh, it corresponds, I guess, with the place.
Q. I ask you, is it correct?
A. It may be and may not.
Q. Is it or is it not?
A. I can't say.
Q. Can't say whether it is or is not?
A. No.
The COURT (to witness). Look at it.
WITNESS. Yes; that will do, it was reversed awhile ago.

By Mr. MCBRIDE:

Q. Do you know who made it?
A. No, sir.
Q. What do you mean by saying that will do?
A. Well, it will correspond with the store and the saloon and the counter and tables.
Q. Don't you know that that has been changed since you first looked at it right here before the jury?
A. I made the remark of it; the names of the avenues were changed then.
Q. Changed when?
A. Awhile ago there.
Q. After you looked at it?
A. Yes
Q. After you said it was correct?
A. No; I didn't say it was correct.
Q. When you described those things in the bar-room, the tables and counter and ice-box?
A. I told Mr. Johnson the avenues were reversed. He put Kossuth avenues on the east side.
Q. Where do you board now?
A. I board on Kossuth and Garibaldi, I think.
Q. Have you been to Mrs. Mueller's house lately?
A. Not to her house.
Q. Have you seen her lately?
A. I saw her out there (witness room).
Q. Have you seen her before to-day?
A. I may have passed her house; I could not tell.
Q. Have you seen her lately; within a month or six months?
A. Yes.
Q. How many times?
A. I can't tell. I met her on the cars a couple of times.
Q. What is she doing now—boarding-house?
A. No.
Q. Saloon?
A. No.
Q. Grocery store?
A. No.
Q. How long have you li'ed in St. Louis?
A. I come here in '80.

Q. Are you married?
A. No.
Q. Where did you come from?
A. From Davenport, Iowa.
Q. Have you been talking to the counsel in this case, the special counsel that have been brought here—I am not talking of the State's attorney or the assistant State's attorney, but the private counsel; have you been talking to them about this case?
A. Not that I know of.
Q. You have not seen Governor Johnson lately?
A. No.
Q. Haven't talked to him?
A. No.
46 Q. Haven't talked to him the last week?
A. No.
Q. Or the last month?
A. No.
Q. Or this young man, Mr. Muench—you know him, do you?
A. I do.
Q. Have you been talking to him lately?
A. No.
Q. Within the last month?
A. No.
Q. Or the la't year?
A. No.
Q. When did this homicide occur?
A. On the 26th day of August, 1881.
Q. You are sure of that, are you?
A. I guess so.
Q. Are you sure of that?
A. Yes.
Q. Did you make a note of it at the time?
A. No.
Q. What day of the week was it?
A. I don't remember what day of the week it was.
Q. How do you come, after the lapse of three years and a half, to remember all the small details of this sort?
A. I can't give any particular reason for it.
Q. You haven't talked to anybody about it since the last trial?
A. I may have spoken to outside parties about it.
Q. What parties have you spoken to?
A. Not that I know of; I can't say.
Q. You have not spoken to Mrs. Mueller about the case?
A. No.
Q. You have not spoken to the attorneys about the case, or either of them?
A. No.
Q. And not having spoken to either of the attorneys or the parties interested about these matters for three years and a half, you profess to know now all the details of a transaction that occurred three years and a half ago?

A. I don't presume to remember all the details of the thing.
Q. Who were in there at the time you entered the saloon?
A. There were three or four others in there; there was a man by the name of Oberheide in there, a butcher.
Q. Where was he?
A. I think he was in the grocery store.
Q. You were sitting down reading a paper, weren't you?
A. Yes.
Q. At the time the trouble occurred between these two men?
A. Yes.
Q. What paper were you reading?
A. The Globe Democrat; I was reading the dispatches from Washington about how Garfield was getting along; I don't remember the particular matter that was contained in the dispatches.
Q. How long did you remain there reading that?
A. Just reading late dispatches.
Q. How long did you continue reading?
A. I don't remember how long; I didn't get through them.
Q. Did you have the paper up before your eyes or down?
A. I had it in my hand.
Q. Did you have it up or have it down?
A. I can't say; I must have had it my hand, for my back was to the table.
47 Q. Did you have it up before your eyes or did you have it down on the table?
A. My back was to the table. I must have had it in my hand?
Q. Which way was you' back?
A. My back was to the south.
Q. The counter was north of you where you were sitting?
A. Yes.
Q. And you were sitting reading the paper?
A. Yes.
Q. You were reading the Garfield dispatches at the time?
A. Yes.
Q. And that is what occupied your attention at the time the trouble began?
A. I was reading the telegrams from Washington at the trouble commenced.
Q. Where were those parties sitting—at the table?
A. There was one of the men at the east end of the counter eating lunch. I think his name was Fisher. I did not know him before that day. I know his name was Fisher because I heard it here in the court. I know his name is Alex. Fisher because I heard his name called here several times. There was another man at the east end eating lunch. There was another man east of him.
Q. Were you watching these men eating lunch?
A. He was eating lunch.
Q. You were not paying attention to the paper then?
A. At the time I went in they were eating lunch.
Q. At the time you were reading the paper those men were eating lunch?

A. I supposed they were, for they were eating when I went in there?

Q. How long were they eating lunch?

A. I don't suppose they were eating long, for I was not in there more than five minutes.

Q. From first to last?

A. From first to last, while I was in there.

Q. Where was Oberhiede, the butcher?

A. I presume he was in the store.

Q. Did you see him in the store?

A. I saw him go in there.

Q. Did he come out afterwards?

A. I suppose he did.

Q. I am not talking about your suppositions.

A. I did not see him come out.

Q. At the time of the shooting who were in that saloon?

A. I told you before who was in there.

Q. You did not tell me.

A. Well, I was in there, Miller and his wife was in there, and Oberhiede was in the store, as far as I remember. Fisher was eating lunch and this other old man was eating lunch at the side table.

Q. I thought you said awhile ago that Oberhiede was not in there at all?

A. He was in the store.

Q. I mean in the saloon. Was Oberhiede in the saloon at the
48 time of the shooting?

A. I did not say that.

Q. There were some things said between these men, and some things done that you did not see; isn't that true?

A. There were some words that passed between them that I don't remember.

Q. While you were looking at the paper and reading the paper you were not observing what Hayes was doing or Mr. Miller was doing, were you?

A. When Mr. Hayes——

Q. At the time you were reading the paper, at that time, were you then observing what Hayes and Miller were doing, or what these other men were doing at the time your attention was engaged in reading that paper?

Mr. JOHNSON. I shall ask here to have the witness be allowed to make his answer to the questions that are propounded.

By Mr. MCBRIDE:

Q. At the time you said you were engaged in reading the dispatches from Washington City about the condition of President Garfield, at that time, and while you were so engaged, were you observing what occurred between Hayes and Mueller, the deceased, and what was said between them at that time?

A. When Hayes hollered for Mueller I quit reading. I thought it was singular that he should holler for Mueller when his wife was standing there. If he wanted beer he could get it from his wife. I quit reading then.

Q. While you were reading, at the time you were reading, were you then observing what occurred between these parties?

A. When he hollered I quit reading.

Mr. McBRIDE. I will ask the court to put my question.

By the COURT:

Q. What were you doing at the time you first noticed Hayes, when your attention was first called to him, what were you doing?
A. I was reading.
Q. Where was he and what was he doing when you first noticed him?
A. He was standing outside of the bar.
Q. How long after you noticed him was it before he called to Mueller?
A. It may be a couple of minutes.
Q. Well, the *the* moment he called to Mueller you quit reading?
A. Yes.
Q. What occurred between Mueller and him transpired after he called to Mueller?
A. Yes, sir.
Q. From the time that you quit reading did you resume it again?
A. No.

By Mr. McBRIDE:

Q. Wasn't Mueller in the saloon and behind the bar when you came in?
A. Yes.
49 Q. Wasn't Hayes there when you came in?
A. Yes.
Q. If Mueller was there how long did Hayes remain?
A. Hayes remained all the time there whilst I was there.
Q. You say that Mueller went in from the saloon into the grocery.
A. Yes, he went from the saloon into the grocery.
Q. At the time that Mueller went from the saloon into the grocery was there anybody behind the bar, the counter?
A. Mrs. Mueller was standing near the ice-box.
Q. Do you swear to that?
A. She did not leave.
Q. What is that?
A. She was there all the time.
Q. She was there when you came in, behind the bar?
A. Yes.
Q. And Hayes was there when you came in?
A. Yes.
Q. And Mueller was behind the bar when you came in?
A. Yes.
Q. And you say that Mueller left the bar and went into t'e grocery?
A. Yes.
Q. And he was there when Hayes called him in there?
A. Yes.
Q. Now isn't it a fact that it was Mrs. Mueller went into the grocery to make some order about the meat that was ordered from this butcher?
A. No.
Q. It was Mr. Mueller?
A. Yes.
Q. He hollered for Mueller?
A. Yes.
Q. What did he say?

A. He hollered for Mueller. Mueller said to Hayes, "What do you want?" "I want a glass of beer," said Mr. Hayes. Says Mueller, "You can't have it, you got beer enough, and you can't have no more," or something to that effect.

Q. And Mrs. Mueller remained behind the bar all the time?

A. Yes. When I went in and when I came out she was there.

Q. And did not go into the grocery part of the establishment?

A. Not that I know of.

Q. Did she or did she not?

A. Well, I didn't miss her.

Q. If you did not miss her, could you not miss Hayes at the same time?

A. She might possibly go in there whilst I was reading the paper.

Q. Did Hayes go out in the mean time?

A. No.

Q. You kept your eyes on him all the time?

A. No; but if he went out I could see him.

Q. You were watching Hayes?

A. No.

50 Q. And watching the people that were eating lunch and reading the paper at the same time?

A. No, I was not; I didn't count how many bites Fisher ate while he was in there.

Q. How many shots were fired?

A. One.

Q. Only one?

A. That is all I heard.

Q. Were those men eating lunch at the time the shots were fired?

A. Yes.

Q. Was Mrs. Mueller behind the counter at the time the shots were fired?

A. Yes, sir; at the ice-box.

Q. That was not behind the counter?

A. It came right up to the west end of the counter.

Q. Was it behind the counter?

A. It was at the west end of the counter.

Q. Was there any club or pistol kept behind that counter?

A. I can't tell.

Q. Never was any club kept behind there?

A. No.

Q. Or pistol?

A. No.

Q. Were you ever behind the counter?

A. No.

Q. Never go behind that counter?

A. I never did.

Q. Did you sleep in that house as well as board there?

A. Yes.

Q. Mr. Mueller spoke very pleasantly to Mr. Hayes?

A. There was no angry words passed between any of them that I heard.

Q. There were some words passed that you did not hear?
A. There were some trifling remarks about the beer.

By the COURT:

Q. Do you mean to say that you did hear or did not hear, or that you did hear and don't now remember?
A. Yes.
Q. You mean there were words and don't now remember?
A. Yes.

By Mr. MCBRIDE:

Q. They seemed to be friendly to you?
A. The one demanded a glass of beer in a cool way, and the other friendly refused to do so.
Q. You had seen him the winter before?
A. Yes.
51 Q. He was in the habit of visiting that saloon?
A. Yes.
Q. He patronised that saloon before?
A. Yes.
Q. There was nothing unpleasant between those men, as far as you know?
A. No.
Q. If there were any angry words or any other angry demonstration passed between those men, you did not know it?
A. I never heard it. I never knew that there was anything previous.
Q. At that time—that day?
A. No; he demanded a glass of beer, and he refused it.
Q. He said he had enough?
A. He had enough, and he had beer before and he didn't pay for it.
Q. That's something new. What reason did he give for refusing it? Was it because he had enough, or that he had a glass of beer before and did not pay for it?
A. I am telling you.
Q. Did he give both reasons?
A. I am telling you the reasons he gave. He says, "I gave you a glass of beer before, and I can't give you any more."
Q. This is the first time you stated that?
A. I guess not.
Q. And he told him that he had enough?
A. Yes; as well as I remember.
Q. Do you remember that?
A. That is the best I remember of it. He said he had beer enough, and would not give him any more.
Q. You had not seen Mr. Mueller give him any beer before that?
A. No.
Q. You had not seen Mrs. Mueller give him any beer before that?
A. No.
Q. You don't know anything about that?
A. No.
Q. What time of day was this?
A. Eleven o'clock, or may be after; some time between half past eleven and twelve.

Q. What occasion had you to go in there?
A. I went in to get dinner.
Q. And you sat down to read the paper waiting for dinner?
A. Yes.
Q. How large a man was Mr. Mueller?
A. He was a large kind of a man.
52 Q. Take this man, Mr. Reynolds. [A member of the jury.—Reporter.] Was he as large a man as Mr. Reynolds?
A. Mr. Mueller was a larger man.
Q. About how old was he?
A. Somewhere along about 33 or 35 years old; somewhere along there; 30 or 35 or 36; somewhere alone there.
Q. Do you mean to say to these 12 gentlemen that you recollect every word that was spoken by Mr. Mueller and Hayes now?
A. No; I don't.
Q. You don't mean to say that?
A. I told you before.
Q. Do you mean to say that you recollect everything that was done by Mueller and Hayes?
A. There was some words passed between them, but I don't recollect the words now.
Q. Do you remember everything that was done by Mueller and Hayes, and every movement that each one made; do you remember now, after the lapse of three years and a half, every movement that Mueller made and every movement that this man made, of head, hand, or foot; do you remember that?
(No answer.)
Q. By the COURT. He asks you if you recollect every movement that was made either by Mueller or Hayes, either by head, hand, or foot?
A. I seen the movements that were made between them.
Q. You seen the movements?
A. I seen the movements, sir.

By Mr. MCBRIDE:

Q. I will put my question, whether at this day you do remember every movement that was made by Mueller and by Hayes, either or both of them, by hand, foot, or body?
The COURT (to witness). Answer, do you remember or do you not?
WITNESS. I remember; I have seen it.
The COURT. Answer the gentleman. Do you or do you not now remember it?
WITNESS. Yes; I remember it.

By Mr. MCBRIDE:

Q. And you remember every word that was said?
A. There was words said; before I told you that I could not exactly say what they were; some trifling words about the beer.
Q. You did not see Hayes any more after the shooting?
53 A. I seen him when the policeman had him arrested that afternoon.
Q. That was about the saloon?
A. No.

Q. You say he walked away. Did Hayes walk away?
A. I left before he did.
Q. You left first?
A. Yes.
Q. Did you leave those other persons in the saloon that you met there when you went in there?
A. Yes.

HENRY OBERHIEDE, being sworn, testified.

Direct examination by Mr. JOHNSON:

My name is Henry Oberhiede. I am a butcher. My place of business is on the Natural Bridge road. I knew Philip Mueller, I was at his place of business the day he was killed. I went there between 11 and 12 o'clock in the morning.

Q. Now, go on and state to these gentlemen just what you saw of this transaction of the killing of Mr. Mueller from the time that you got there; tell it in your own way to them.
A. Well, I just went in the bar-room and go and get my order for the meat, and I went with Mrs. Mueller in the grocery store——
Q. Wait a minute. Before you went in, did you see anybody or speak to anybody in there?
A. Well, Mr. Hayes was in there.
Q. Where?
A. I don't remember exactly any more, but I think he was in front of the counter, in the bar-room side.
Q. Who else did you notice in there when you got in; what other persons, if any?
A. Well, I seen Kelly in there, but the other peoples I didn't know.
Q. Did you say anything to Hayes?
A. Well, I was speaking with him a couple of words, but I don't remember no more what I said.
Q. Don't you remember what you said to him and he to you?
A. No; I don't remember no more.
Q. Well, go on now, and state——
A. Well, I went into the grocery to Mrs. Mueller, and asked
54 her what kind of meat she want, and then walk back.
Q. You went with who?
A. With Mrs. Mueller.
Q. Into the grocery?
A. Yes, sir.
Q. And asked her what?
A. What kind of meat—I deliver meat there—what kind of meat she wants? We come back and keep standing there in that door, you know—that door which went from the saloon in the grocery—and we was standing there awhile, and then I seen just Mr. Hayes have something in his hand, I thought. I looked at it for a revolver, and at the same time the shot come out of the revolver.
Q. What was Hayes' position when you stood there in the door? What did you see him do?
A. He stand right by the middle of the counter. I just come to see the face and the hands, you know.

Q. Where was Mr. Mueller?
A. He was behind the counter?
Q. Where was Mrs. Mueller at that time?
A. She was then by the ice-box, not far from me.
Q. How far is that ice-box from the door where you were standing?
A. I guess about two steps; I didn't know exactly.
Q. Was Mrs. Mueller behind or outside of the counter?
A. I can't remember exactly no more where she stand—which way.
Q. You had come from the grocery into the bar?
A. Yes, sir.
Q. Did you hear any words passed between Mr. Mueller and Mr. Hayes at the time that he raised his hand or at the time that he fired?
A. I didn't notice it exactly; I was busy; I didn't take notice of that.
Q. Could you see what Mr. Mueller was doing at that time?
A. Well, the time what I was there he gave me a glass of beer. That was before I went in the grocery, you know.
Q. You stopped in the saloon, then, to get a glass of beer before you went in?
A. Yes, sir.
Q. Where was Hayes standing at that time?
A. Well, he was standing not far from me; he was standing in front of the counter.
55 Q. Was he saying anything at that time, that you remember, to anybody?
A. I don't remember any more; I can't tell?
Q. Do you remember of his saying anything; that is, using any language that you don't remember to you or to Mr. Mueller?
A. Sir?
Q. Do you remember of his talking any at all?
A. Well, they talk together, but then I don't understand it right.
Q. After you drank your beer, did you remain there any time, or did you go right into the grocery?
A. I go in the grocery.
Q. Where was Mrs. Mueller at the time you drank your glass of beer before you went into the grocery?
A. I don't remember any more; I can't tell it.
Q. Was there anybody else there? Did you see anybody there at the counter before you went into the grocery, at the time Mr. Mueller gave you your glass of beer? Did you see whether or not he was giving a glass of beer to anybody else?
A. I don't remember no more.
Q. Did you notice, or do you remember, whether or not there was anybody before the counter at the time that you got your glass of beer besides you and Mr. Hayes; that is, in front of the counter?
A. Well, there were some mans there, but then I don't know him.
Q. Were they standing immediately at the counter or somewhere else?
A. Well, some was sitting on the chairs and a couple was standing in front of the counter.
Q. What was done as soon as you saw the shot fired—I believe you stated you saw him shoot?
A. Saw him shoot.

Q. Where was Mr. Mueller standing at the time he was shot?
A. He stand right in the middle of the counter, you know.
Q. Behind the counter?
A. Behind the counter.
Q. Was he doing anything?
A. Not what I seen.
Q. Did you see where Mr. Hayes brought his pistol from?
A. No, sir; I can't tell.

56 Q. What was his position when you first saw him, Hayes, when you looked out the door?

A. I just seen his hand and seen the revolver in his hand, something like that [indicating] I don't know, but then at the same time the shot came out, too, already.

Q. I mean what was the position of his arm at the time the shot was fired?

A. Well, he hold his hand that way [indicating] on the counter.
Q. Above the counter, or on the counter?
A. No; on the counter, on top of the counter.
Q. What was done then?

A. Mueller fell down, and then I went out the door in the yard and went to call some peoples there, and then I went in the bar-room again.

Q. Was Hayes still there?

A. I didn't notice that. I didn't notice exactly if he went out or not, but I seen him when he passed just the door. There is a door from the yard that goes out on the street, and I seen him as he passed the door and went to the car stables.

Q. You saw who doing that?
A. I saw Hayes.
Q. Were you in the yard?
A. I was just in the yard, and I came in the saloon again.
Q. And as you came in the saloon you saw Hayes pass the door?
A. Yes, sir.
Q. Where was Mueller at that time? What was his condition?
A. When I went in he was laying down by the counter, on the floor.
Q. Was he alive or dead?
A. He was dead.
Q. How far were you from him when he fell?
A. About three or four steps, or five; I don't know it exactly.
Q. When you came back where was he laying?
A. He fell down at the east end.
Q. The east end of the counter?
A. The east end of the counter.

Q. Which direction did you go as soon as the shot was fired,
57 towards him or out in the yard?

A. I went out the door then. As soon as I saw Mueller fall I went out the door into the yard.

Q. You went out to call help?
A. Yes.

Q. Could you tell, from what you saw of the pistol, what kind of a pistol it was?

A. I can't tell that; I don't know.

Q. What was the color of it?
A. I don't know exactly; I didn't notice it.
Q. Do you remember the day?
A. It was on the 26th of August, 1881.
Q. Do you remember the day of the week?
A. I don't remember that.

Cross-examination by Mr. McBRIDE:

I had my horse and wagon with me. I had been in the habit of selling them meat—they kept boarders—and I went there that day to get an order for meat. I don't know exactly where Mrs. Mueller was when I entered the saloon.

Q. Well, she was not in the saloon?
A. I could not tell exactly that any more.
Q. When you went to hunt Mrs. Mueller you found her in the grocery?
A. Well, I don't know. She went in the grocery; I went in the grocery, too.
Q. Who was behind the counter when you went in?
A. Mueller was behind the counter.
Q. Anybody else?
A. I don't know; I don't remember any more.
Q. You took a glass of beer, I suppose?
A. Yes, sir.
Q. Who was it that generally gave you the order for the meat—was it Mueller or Mrs. Mueller?
A. Mrs. Mueller.
Q. You don't recollect whether you saw Mrs. Mueller in the saloon or not?
A. Well, she was sure in the saloon.
Q. When you went in?
A. Yes, sir.
Q. If she was in the saloon why did you go into the grocery store to get the order, into another room?
A. She went into the grocery and I went in, too, after her.
58 Q. I want to understand you. At the time you went into that saloon was Mrs. Mueller in the saloon?
A. I don't remember, but at the time I went around the ice-box she was there.
Q. Where did you get the order, in the saloon or grocery?
A. In the grocery.
Q. How long did you remain in the saloon before you went into the grocery?
A. I don't know exactly.
Q. Just long enough to say "good day" and drink a glass of beer?
A. Yes, sir; Mr. Mueller gave me the glass of beer.
Q. Was there anybody else there?
A. I don't remember. There was some other people standing at the counter.
Q. You remember that there were some other people in the saloon?
A. Yes, sir.
Q. This man Kelly was there?
A. Yes, sir.

Q. What was he doing?
A. I don't know?
Q. Was he reading the paper?
A. He was sitting at a table, but I don't remember what he was doing.
Q. Which way was his head turned, his face?
A. I can't tell any more. I believe he was sitting against the wall.
Q. Do you remember which wall?
A. I believe it was the south side of the wall.
Q. Which part of the wall, the east or west part of it—the wall runs east and west?
A. It runs from east to west.
Q. He was sitting against the south wall, you think?
A. Yes, sir.
Q. Do you recellect whether he was reading a paper at the time?
A. I don't know.
Q. Then you went in and you got your order from Mrs. Mueller?
A. Yes, sir.
Q. And while you were in there did you hear any noise or trouble between any parties in the saloon?
A. I didn't take no notice of that; there was so much talking there I didn't notice exactly what they said.
59 Q. That is, after you went in the grocery you heard talking in the saloon?
A. Well, there always was talking in the saloon.
Q. Was it loud talking; was it angry talking?
A. I don't know what you mean.
Q. I mean a quarrel, for instance; that is what I mean by "angry talking."
A. No; I did not hear any quarrel.
Q. Rough words?
A. I don't remember any more exactly.
Q. Don't remember that?
A. No.
Q. Did you go back in the saloon before the shooting? You remained in the grocery?
A. I keep standing in the door there then.
Q. Where was Mrs. Mueller?
A. She was not far from me.
Q. Which way was she from you, east or west of you?
A. East.
Q. At the time of the shooting you did not see his face; you saw a hand on the counter?
A. Yes.
Q. He was on the south side of the counter, wasn't he?
A. Yes, sir.
Q. Do you know what part of the counter Mr. Mueller was at?
A. Just right about the middle of the counter; I don't know exactly.
Q. You did not see Mr. Mueller; you just saw his hand?
A. I saw Mr. Mueller, too.
Q. At that time?
A. Yes, sir.

Q. Where was he standing?
A. Behind the counter?
Q. What were they saying to each other?
A. I could not say. I don't remember any more.
Q. Do you remember just before the shooting when you came to the door that leads from the grocery into the saloon, how long was that before the shooting; was that just one second or was it just as you came in?
A. I don't remember any more; it didn't took long, though.
Q. Just when you came to the door the shooting took place?
A. No; I say it didn't took long; I didn't stand there long.
Q. Did you see Hayes do anything; did you see him pull his pistol out of his pocket?
A. No; I didn't see that.
60 Q. Did you hear what he said before he shot?
A. No, sir.
Q. Did you hear what Mueller said before he shot?
A. No, sir.
Q. Did you see what Mueller did before he shot?
A. I don't remember any more.
Q. All you know is, you saw his hand and heard the shot?
A. Yes.
Q. And as soon as Mueller fell you went out in the yard?
A. Yes.
Q. To call some people—or wanted to call some people—and then you saw him passing the crossing? You say you saw him outside?
A. Yes; I seen him pass the door there.
Q. Which way did he go?
A. West; to the car stables.
Q. The car stables were right in the rear, back of the saloon, were they not? The saloon fronts on Grand avenue?
A. Yes, sir.
Q. And the car stables are a little that way, to the west, on Kossuth avenue?
A. Yes, sir.
Q. About how far are the stables from the saloon?
A. About half a block.
Q. Did you see the pistol afterwards?
A. No, sir.
Q. When he was walking along did you see the pistol?
A. No, sir; I didn't notice it.
Q. Was there anybody with him?
A. No, sir; I didn't see nobody.
Q. How long was it before you came back from the yard into the saloon?
A. That didn't took long.
Q. Was it a minute, or two minutes?
A. I don't remember any more.
Q. Did you see Hayes drink beer?
A. I can't remember; I don't know.
Q. Did you hear him ask for any beer?
A. I don't know.

Q. You don't recollect a word that Mueller said to Hayes or Hayes said to Mueller?

A. I don't know no more.

Q. Did you know Hayes before that time?

A. Yes, sir.

Q. What business was he in?

A. Well, he was around in the stock-yards.

Q. In the cattle business?

A. Yes.

61 Q. At the time you first noticed Hayes, was he standing up or sitting down?

A. He stand up, I believe; I don't know exactly, but he stand by the counter.

Q. You don't remember now?

A. No, sir.

Q. You don't remember now whether he was sitting down or standing up?

A. I don't remember any more.

Q. Did Hayes speak to you or you speak to him?

A. I don't know who spoke first. I know we was speaking together; we say a couple of words; I don't remember now.

Q. You don't remember?

A. No.

Q. You don't remember whether he was standing up or sitting down?

A. He was standing up at the time I spoke to him.

Q. But you did not hear him speak to Mueller or Mueller to him?

A. No.

Q. At any time?

A. Well, they was speaking together, but I did not understand what they said.

Redirect examination by Mr. JOHNSON:

Q. They were speaking together, you say, but you did not understand what they said?

A. No, I didn't understand it.

Q. When do you mean, now, at the time you were drinking the glass of beer?

A. Yes; when I passed I went in the grocery; they speak together, but I didn't not notice what they say.

Q. Was that before or after you drank your glass of beer?

A. Before.

Q. What I say, before you went in the grocery, was it after you drank your glass of beer?

A. Yes, sir.

ISAAC FISHER, being sworn, testified.

Direct examination by Mr. JOHNSON:

My name is Isaac Fisher; I am somewhat out of business now; my business has been always stair building; I have lived in St. Louis some 46 years; I came here in '38; I remember the day of the killing of Philip Mueller on Grand avenue and Kossuth avenue very well.

62 Q. Will you go on and state just exactly what you know about it, in your own way, please, and I will not have to ask you any questions, or as many?

A. Well, I had a daughter living out there within a block of this saloon that was about to move away, and I made arrangements with her the day before to come out and pack her furniture for her, and I didn't feel well that morning and I didn't go out very early. I did not start till about 10 o'clock from Jefferson avenue, where my little shop was, and I think it was about 11 o'clock, or a little after, when I went there. I went on the Kossuth avenue cars, and the cars took me right past my daughter's door, but I thought I would stay in the cars until I got over to the saloon and go in and have a glass of beer before I went in and go to work, and I went in and called for a glass of beer, drank it and paid for it, and turned around to the end of the counter where there was a little lunch set and commenced to partake of the lunch, and I heard somebody say, "Mueller, give me a glass of beer; I haven't got any money, but I will make it all right." Mueller said that was not business, something to that effect, but he didn't mind, he would give him a glass of beer, and he did give him a glass of beer, and when he drank it off he turned around, and as he turned around he said, "I will make that all right." Mueller said, "I expect you will," or "I suppose you will," and he says, "You are dam right, I will." I still stood there at the end of the counter partaking of the lunch. I don't know how long it was, it might be 5 or 10 minutes, or possibly longer, and I heard somebody say, "Mueller, give me another glass of beer," and I looked around and I seen it was the same man——

Q. Is this the man, by the way [pointing to defendant]?

A. Yes; that is the same man. Mueller said, "No; you can't get any more beer here; I gave you a glass of beer a little while ago; you can't get any more beer," and he came a little nearer the counter. At that

63 time he was four feet away from it, or some such distance. He come a little nearer the counter, and he asked him again for a glass of beer. Mueller says, "It's no use; you can't get any more beer here." Well, then he come up against the counter and he asked him for beer again, and Mueller said he can't give him any more beer, he couldn't have any more here, and then he put his hand down to his hip pocket here [indicating]. That side was right towards me. I saw him take the revolver out and hold his hand this way [indicating], nothing but the counter between them, and he held the pistol within five or six inches of Mueller's face, and he says, "Are you going to give me another glass of beer?" Mueller says, "No," and he hadn't more than spoke before the trigger was pulled and he was shot, fell down behind the counter, and seemed perfectly dead.

Q. And that was the transaction as you saw it?

A. That is just as I saw it.

Q. You might state what you did afterwards, or what Hayes did afterwards, and what you did?

A. Well, he walked back and forth in front of the counter for a minute or more, and then he walked out of the Grand Avenue door very leisurely and walked back towards the car stables.

Q. What did you do?

A. Well, I went out at the same door and looked after him. He was going towards the car stables. I looked in every direction to see whether there was not somebody in sight to take notice of this matter. I could not see anybody, and I walked along probably fifty or one hundred feet behind him, a little ways down toward the car stables, and he suddenly turned around and looked at me. Then I concluded it was no good place for me, and I went back to the saloon, and there is a back door at the side of the saloon, on the south side, and I went in at that door, and there was some men, probably half a dozen women had got around Mrs. Mueller, and she was frantic and seemed to be in a terrible way and they were trying to pacify her. It was something I had nothing to do with. I went to the counter then and leaned over and saw Mueller laying flat on his back, and a little stream of blood coming out of the wound.

64

Q. Where was it; whereabouts; locate the wound to these gentlemen?

A. To my best recollection, it was right below this corner of the eye, just right about there [indicating on his own person].

Q. Did you see Mrs. Mueller at the time of the shot?

A. I didn't see her till the crack of the pistol, and then I saw her She screamed, you know, and I saw her away at the back end of the ice chest.

Q. How far from her husband?

A. I think she might have been may be eight or twelve feet; something more than the length of the ice chest; I think the ice chest might have been six feet long.

Q. Is this the man?

A. That's the man.

Q. Describe the pistol as you saw it.

A. It looked like a bright, new, English Bull Dog, as I have heard them called.

Q. Revolver, you mean?

A. Yes; little short barrel not longer than my finger.

Cross-examination by Mr. McBRIDE:

Q. How long were you in the saloon before you heard the shot?

A. Not, I don't think, more than 15 minutes.

Q. Well, in your judgment, were you there that long? Were you 15 minutes in the saloon before you heard the shot?

A. I think it is likely I was. I had no means of taking account of the time.

Q. Who were in the saloon when you entered it; who were there?

A. I did not know any of the parties that were there.

Q. How many were there?

A. I think there was half a dozen, at least.

Q. When you went in there was, at least, half a dozen of people?

A. Yes, sir; I think there was; I did not know any of them. I had never seen this man (defendant) before; I don't know whether he was in the saloon when I entered it or not; I did not notice him until somebody asked for a glass of beer and said he had no money; I was at the end of the counter and looked up to see who it was out of money; I was at the east end of the counter, towards the east door on Grand avenue; that is where I was eating lunch; I did not see Mrs. Mueller when I went in.

65

Q. She was not behind the bar?

A. Mr. Mueller waited on me himself; there might have been others behind the bar, I don't know that.

Q. Was Mrs. Mueller behind the bar when you went in?

A. If she was I didn't notice her.

Q. Didn't notice whether she was or not?

A. No.

Q. Did you see Mrs. Mueller before you heard the shot fired—heard her make an exclamation—did you see her before that?

A. No, I did not see her before that. That is the first time I noticed her.

Q. Immediately after the shot was fired you heard her holler out, scream out?

A. I heard her scream, and I looked around and seen her throw up her hands. That was right at the ice chest. That was after the shot was fired.

Q. Had you ever been in that saloon before?

A. Yes, sir.

Q. Did you know Mueller?

A. I knew him as a saloon keeper. I never knew his name until I saw it published the next morning afterwards, but I had taken a glass of beer at his place different times.

Q. You knew him as the man who kept that saloon?

A. Yes; I knew him as the man who kept that saloon.

Q. And that was all?

A. Well, I knew him before he went there. He kept a saloon on Chouteau avenue, and I went there occasionally and got a glass of beer, but I never knew his name.

Q. Did you know Hayes before?

A. No, I never saw him until that day.

Q. Did Hayes drink anything there at all while you were there?

A. Only the glass of beer that was given him the first time, when he first called for it.

66 Q. You saw him drink one glass of beer?

A. Yes.

Q. I thought you stated awhile ago that Mr. Mueller refused to give him a glass of beer?

A. He gave him the glass of beer, but he refused to give him when he come back the second time.

Q. Did he go away out of the house?

A. I did not notice whether he went out of the house or not.

Q. How long after he got the first glass was it before he asked for the second?

A. Well, it might have been ten minutes.

Q. You don't know whether he went out of the house or not?

A. No.

Q. You didn't notice him any more in the house until he came back and asked for the second glass?

A. No.

Q. You don't know what occurred between him and Mueller from the time Mueller gave him the first glass of beer until he returned and asked for the second?

A. No.
Q. At the time Mueller was shot what was he, Mueller, doing?
A. He was standing straight up behind the bar.
Q. Did he have anything in his hand?
A. Not that I noticed, at all.
Q. Which side of the head was he shot on, the right or the left?
A. I think it was just below the corner of the left eye.
Q. The left eye, was it?
A. Yes; I think it was the left eye.
Q. Did you see the man after he was shot?
A. Yes.
Q. You came back immediately after going out?
A. I saw him in the morgue here.
Q. Did you notice the position of the wound at that time?
A. Well, I did not charge my memory particularly with it, but I think, from my best recollection, it was right under the corner of his left eye.
Q. What did the defendant do with the pistol after he fired the shot?
A. He had it in his hand while he was walking back and forth in front of the counter. I did not notice whether he had it in his hand when he was going towards the car stables or not.
67 Q. He said nothing?
A. No.
Q. He said nothing, the defendant?
A. He did not say anything at all.
Q. So that after firing the shot he retained the pistol in his hand, and walked up and down before the counter in the saloon?
A. Yes.
Q. And then walked away towards the car stables?
A. Yes.
Q. And you followed him for some distance, and returned to the saloon?
A. Yes.
Q. And saw Mr. Mueller lying there dead, as you thought?
A. Yes.
Q. What is your age?
A. I am 72 the last 4th of July.
Q. Is your memory as good now as it was thirty years ago?
A. I don't think it is.

THEODORE FELSCH, by consent of both parties, was duly sworn as interpreter.

ELIZA MUELLER, being sworn, testified through interpreter as follows:

Direct examination by Mr. JOHNSON:

My name is Eliza Mueller; my husband's name was Philip Adam Mueller; my husband died August 26th, 1881; we had just been living a year and a half on the very day he was killed out at that place; my husband's place was located on the northwest corner of Grand and Kossuth avenues; I was present at the time my husband was killed; I was behind the counter; I know the defendant, John Hayes.

Q. How long had you known him before this occurrence?
A. He came and went into our saloon all the time that we were there.

Q. Now, state to the jury the particulars, just as they occurred that morning, the 26th of August, 1881, the killing of your husband.

A. Hayes came in between 10 and 11 o'clock in the forenoon, and asked for two glasses of beer.

Q. Asked who?

A. He asked me.

Q. What time was that?

A. That was about between 10 and 11 o'clock.

68 Q. Well, do you mean that he asked for them both at once or at different times?

A. He asked for one after the other; he drank them one after the other.

Q. Where was your husband at that time?

A. My husband was behind the counter, near the ice cooler. I gave him the two glasses of beer. There was not a word said at that time. He drank the two glasses of beer and did not pay me for it, and then left by the Kossuth avenue door.

Q. Was there anything said to him at that time by you or your husband?

A. Not a word, only Hayes said to me when he left by the Kossuth avenue door, "Take care of yourself." Then I went to the ice box to do something there, and when I turned around, I saw him re-enter through the Grand avenue door. When I saw him come in, I went right back behind the counter, and he asked my husband for some matches, and I gave them to him. After I had given him the matches, he went towards the end of the counter where my husband was standing, and he asked him for a glass of beer. He did not give him any. He told him he had had two and that was enough. Then Hayes said some words to my husband, but I didn't understand him. Then my husband said, "I am not afraid of you," and he turned around, and the same minute the shot was fired.

Q. Show how it was that Hayes fired the shot?

A. He just put his hand across the counter close to my husband's head.

Q. What was your husband doing at the time the shot was fired?

A. He had a towel in his hands and wiped his hands.

Q. What, if anything, did he say at that time, or was he saying?

A. He did not say a single word.

Q. Did you hear him say anything else before he was shot besides these words that you have mentioned here?

A. No; I did not hear any more.

Q. Did you hear Hayes say anything?

69 A. No; I only heard him say some words, as I stated before, but I did not understand them.

Q. What were you doing at the time when the shot was fired?

A. I stood behind the counter and was looking at it. I did not do anything particular.

Q. What occurred immediately after the shooting?

A. My husband fell down and Hayes went out through the front door.

Q. Did you see whether or not he did anything with the revolver after he shot your husband?

A. No, I didn't see it.

Q. Did your husband speak at all after his receiving the shot?
A. No; not a word.
Q. Did he live any length of time?
A. No.

Cross-examination by Mr. McBRIDE:

Q. Ask Mrs. Mueller, please, whether the conversation she heard between Hayes and her husband, and which she has detailed here, was in English or in German?
A. That was in English.

JOHN N. FRANK, being sworn, testified.

Direct examination by Mr. JOHNSON:

My name is John N. Frank; I am a practicing physican. On the 26th of August, 1881, I was coroner of the city; I held as inquest on the body of Philip Mueller, that was killed on the corner of Kossuth and Grand avenues. There was a post-mortem examination held by myself, assisted by Dr. Ludeking, I believe.

Q. State to these gentlemen here the conclusions, or the examination and the conclusions, reached in that post-mortem?
A. There was a penetrating gunshot wound of the head, the bullet entering about half an inch above the outer angle of the left eye. The bullet passed inwards, backwards, and to the right, plowing through the base of the brain and fractured the skull on the opposite side, above the ear, where the bullet was found.
70 Q. What did you do with the bullet, doctor?
A. I think I turned it over to the circuit attorney.
Q. Well, was that wound sufficient to cause death?
A. That wound, sir, caused death.
Q. What was the condition of the man otherwise?
A. Healthy, able-bodied man otherwise.
Q. Do you remember what the condition of the bullet was, whether it retained its original form, or whether it was flattened or disfigured?
A. It was considerably flattened and disfigured.
Q. Did you see Hayes that evening, afterwards?
A. I saw Hayes on the day of the shooting, in the afternoon.
Q. The day after?
A. And the day after.
Q. In the afternoon of the day of the shooting?
A. I saw him first on the day of the shooting and again the day after, when the inquest was held.

Cross-examination by Mr. McBRIDE:

You extracted the bullet, doctor, did you?
A. Yes, sir.
Q. Cut through the skull for the purpose?
A. Removed the skull cap.
Q. Did you cut or open any other part of the body?
A. Yes, sir.
Q. Are you sure of that?
A. Yes, sir.
Q. What was the reason for that?

A. We are in the habit of doing that to find out whether there is any serious lesion of the body otherwise.

Q. You say you are satisfied the bullet wound produced death. What is the reason, what is the cause or the occasion of searching for any other cause when you are satisfied that is the cause?

A. Because we usually, to make a complete post-mortem, examine the other vital organs.

Q. That may be; I don't say that is not the custom; but are you satisfied there was an examination of any other part of the body?

A. Yes, sir.

71 Q. Did you make your report of the examination in writing?

A. Yes.

Q. To whom did you give it?

A. That is incorporated in the inquest.

Q. Have you looked at it since?

A. No, sir; not since the last trial.

Q. Well, that is a long time ago, isn't it? Are you willing now to commit yourself to the fact that you did, in point of fact, open the body and examine the internal vital organs, so called, or anything but the skull, and extract the ball?

A. I would not like to say positively, under oath, whether I did or not; but it was the custom.

Q. But in this special case you are not sure that you did?

A. I would not like to say, under oath, that I did.

Q. If, in point of fact, you made no examination of the body and did not open the body to see the condition of the lungs, liver, kidneys, heart, you don't know whether those organs were diseased or not, if you did not make any examination, any actual examination, do you?

A. No, sir.

Q. So that, assuming now that you did not make an examination of the internal organs, the so-called vital organs, that you did not, you could not tell whether there was any cause for death, independently of this, or not, could you?

A. Yes, sir; I could tell.

Q. There was one cause?

A. And only one.

Q. But if you did not examine these organs that you call vital organs, if you did not open the man's body and make an examination, how could you determine that there was no other cause?

A. Because the wound found on the deceased was sufficient to cause instan'eous death.

Q. How do you know if you did not examine?

A. I tell you, now, I am not positive whether I did or not.

Q. Assuming that you did not, you could not tell by looking at the body of the dead man whether his heart was sound, or his lungs were sound, or his kidneys were sound, by the mere examination of his body externally?

A. No, sir, not positively.

72 Q. Could you to any degree of certainty?

A. No, sir.

Q. And, now, as a matter of fact, you can't tell, although it was the custom, whether you made an examination of the vital organs or not?

A. It was the custom, and my impression is, there was.

Redirect examniation by Mr. JOHNSON:

Q. I'd like to ask the doctor to locate, with his finger, the direction of that bullet, on his own head.

(Witness located the direction of the bullet on his own head.)

THOMAS PUNCHEON, being sworn, testified.

Direct examination by Mr. JOHNSON:

My name is Thomas Puncheon; I am a police officer; I was a police officer at the time of the arrest of Hayes for the killing of Mueller; I made the arrest.

Q. State the circumstances; where you found him, what occurred?

A. Well, it was on a Friday, the 26th day of August, 1881. Going out that day it was understood that there had been a shooting scrape up at Grand avenue and Kossuth; and when we got there we heard that Mr. Mueller got shot and killed by Hayes, and parties standing around there pointed out west and says: "He has gone that way," followed up through the car stables the direction he had taken; went over the prairie through to a little house he was in the habit of stopping at, and he was not there; he had gone, and we found further he had gone northeast, over toward the water tower; and we went over that way, and crossing Emily, or what is called 15th street; I looked down and I saw him walking down near Grand avenue; there overtook him and put him under arrest.

Q. Who was with him at this time, if anybody?

A. Miss Mollie Carr.

Q. Who lived at this house that you speak of when you went to the house where he was in the habit of staying?

73 A. This Carr woman.

Q. Were you mounted or on foot?

A. Yes, sir; mounted.

Q. How far, or could you state the route; how far was this from the place of killing?

A. Well, where we got him I should judge is about half a dozen blocks.

By Mr. MCBRIDE:

Q. That is where you arrested him?

A. Yes, sir.

By Mr. JOHNSON:

Q. What is the direction; which direction was he going at that time?

A. At that time he was going east. He had gone west and went across the prairie, and then started northeast, and just going out by the water tower; he was within a block of Grand avenue when we overtook him, going east on Emily.

Q. How far from the river?

A. Well, he was a mile from the river, I guess.

Q. What occurred at that time, if anything?

A. No, sir.

Q. Any words passed between you?

A. Well, nothing more than he wanted to know what we wanted to arrest him for. I told him that was a great question for him to ask. I

says, "You must know what you have been doing." We got along very well until we got to where there was quite a crowd assembled there, and he got a little stubborn there, they were hollering at him.

Q. Did you find any pistol on him?

A. No, sir.

Q. Did you find any pistol in connection with this transaction?

A. None at all.

Q. Did you take any means to find it?

A. Yes, sir. It was rumored there when he went through the stables and went out on the west side, running through the weeds, that he had thrown it there.

Mr. McBride. You must not state what was rumored. I submit this is grossly unjust.

The Court. Objection sustained.

By Mr. Johnson:

B. You did not find it? You look for it and did not find it?

A. No, sir; did not find it.

74 Cross-examination by Mr. McBride:

Q. How long after the shooting was it that you did arrest him?

Q. Well, from the time that they say that the shooting occurred it could not be more than an hour.

Q. Say the shooting occurred at half past 11, how long after that was it you arrested him?

A. We arrested him about a quarter after 12.

Q. At that time you found him walking along leisurely with Mrs. Carr, about six blocks from the place of the shooting?

A. Yes, sir; I guess about six blocks.

Q. And he asked you what you did arrest him for?

A. Yes, sir.

Q. Did you search him at that time to see if he had a pistol?

A. Yes, sir.

Q. Did you ask him anything about the pistol, say anything to him about it?

A. Well, now, I won't be positive whether I did or not; whether I asked him what he done with it or no.

Q. You don't remember?

A. No, sir; I don't remember.

Q. Was he very drunk?

A. No, sir.

Q. Did you know him previously to that?

A. Yes, sir.

Q. Wasn't it a fact that he had been drinking; was crazy drunk for six months prior to that time? Do you know whether it is a fact or not?

A. I know one thing: The man was drinking off and on for some time; yes.

Q. At that particular moment he was not very drunk, you say?

A. The man had been drinking, but he was not very drunk; no.

Q. Who was the other officer that was with you?

A. Officer Winkel.

Q. Is he here?
A. Yes, sir.
Q. Is he on the force now?
A. Yes, sir.
Q. Were you both mounted?
A. Yes, sir.

Whereupon the State rests its case-in-chief.

75 Whereupon the court cautioned the jury, and adjourned until Monday, January 12th, 1885.

MONDAY, JANUARY 12TH, 1885.

Court met pursuant to adjournment.

Present, as on yesterday.

And thereupon the following-named witnesses and testimony were introduced on the part of the defendant:

Testimony for defendant.

MARY HURLEY, being sworn, testified:

Direct examination by Mr. MCBRIDE:

My name is Mary Hurley; I live at 1318 Poplar street; I am a married lady; my husband is a janitor for the Ohio & Mississippi Railroad Company; I have lived in St. Louis about 19 years; I know the defendant, John Hayes; he is a relation of mine; I am his aunt; I have known him all my life-time; I recollect of hearing of the shooting of a man by the name of Mueller in the month of August, 1881, by my nephew.

Q. What were his habits at and before that time with reference to sobriety?

A. I always knew him to be quiet and good when sober.

Q. I am talking about his habits with reference to sobriety—whether he was drinking, or not?

A. He was drinking, sir.

Q. Little or much?

A. A great deal.

Q. How long before that time had he been in the habit of drinking a great deal, as you expressed it?

A. Three months. He was drinking three months hard before he committed that deed.

Q. Drinking hard three months prior to that time?

A. Yes, sir.

Q. You say that you are his aunt, that you have known him all your life?

A. Yes, sir.

Q. You knew what his habits were?

A. Yes, sir.

76 Q. For three months prior to the date of this shooting?

A. Yes.

Q. Now, I ask you the question. What effect upon his mind did drunkenness produce?

(Objected to. Objection overruled.)

A. I always thought he was crazy when he drink.

Q. You always thought he was crazy when he drank?

A. Yes, sir; that I saw no sense to him when he was drinking.

Q. Did he or could he remember what he had done in a state of drunkenness?

(Objected to. Objection sustained; defendant's counsel then and there excepting at the time.)

Q. From your knowledge of him and his habits, and your intimacy with him, and your relationship with him, do you or do you not know whether he remembered what occurred during a period of drunkenness, or state of drunkenness?

A. No, sir. He usen't to remember what he would do when he was drinking. I have had experience of it.

Q. Could not remember anything that occurred when in a state of drunkenness, or drinking hard?

A. No, sir.

Cross-examination by Mr. JOHNSON:

Q. How long did you see him before this homicide or killing?

A. About three months.

Q. You saw him three months before?

A. Yes, sir.

Q. You don't know what he was doing during that three months?

A. No; but I heard he was drinking.

Q. Do you know what he was doing, of your own knowledge, during that three months previous to this killing?

A. No.

Q. You don't know anything about what he was doing?

A. He was drunk when I seen him last.

Q. That was three months before?

A. Yes, sir.

Q. Do you know what his condition was during that three
77 months before. Did you see anything of him, of your own knowledge?

A. No, sir.

By the COURT:

Q. Do I understand you to say that you had not seen him for three months before he killed this man?

A. I seen him three months before that, sir.

Q. Three months before that was the last time that you had seen him?

A. Yes, sir.

MARY BRADSHAW, being sworn, testified.

Direct examination by Mr. MCBRIDE:

My name is Mary Bradshaw; I am a sister of John Hayes, the defendant; I am a married lady; my husband is a moulder; I have lived in St. Louis 19 years; I reside at present on 13th, between Montgomery and St. Louis avenue; I have known my brother all my life; I recollect of having heard of his shooting a man by the name of Mueller, near the fair grounds, in August, 1881.

Q. Had you seen your brother prior to that time; lately and recently prior to that time?

A. Yes, sir.

Q. About how often had you seen him; say for three or four or five or six months before that month of August, 1881?

A. Well, I seen him mostly every evening and morning.

Q. During what time; for how long a time?

A. For a few days before the shooting occurred.

Q. What was his condition during those few says with reference to sobriety?

A. Well, his condition was a drunken one—very drunk.

Q. Very drunk?

A. Yes.

Q. Do you mean that he was very drunk?

A. Yes, sir; I mean he was very drunk.

Q. What had been his habits with reference to sobriety for years before that?

A. Well, they were very good, sometimes, till he got on those sprees, and then he would be drunk all the time.

78 Q. Be drunk all the time?

A. Yes.

Q. Was he in the habit of getting on sprees for years before?

A. Well, not till late years.

Q. You mean late years before the shooting of Mr. Mueller?

A. Yes.

Q. In your judgment and your opinion what effect upon his mind, his intelligence, his memory did those drunken sprees produce?

A. Well, he didn't have no memory at all. He looked to me as though he would be always out of his mind.

Q. He had no memory of what had occurred at all?

A. No, sir; he did not.

Q. And you thought while he was drinking in that way that he was out of his mind?

A. Yes, sir; I did.

Q. You have no doubt about that, have you?

A. No, sir.

Q. Is your mother living—his mother?

A. No, sir.

Q. Is his father living?

A. Yes, sir; his father is living.

Q. Where is his father now?

A. He is living out at College Hill. He is very sick at present, though.

Cross-examination by Mr. JOHNSON:

Q. You are a sister of the defendant, are you not?

A. Yes, sir.

FLORENCE D. WHITE, being sworn, testified.

Direct examination by Mr. MCBRIDE:

My name is Florence D. White; I am a reporter on the Post-Dispatch; I was a reporter of that paper in August, 1881; I recollect the killing, shooting, of Mr. Mueller out at the fair grounds by the defendant, Hayes, in that month; I did not go to the scene of the homicide; I

went to the fair-grounds station, fifth sub; that was on the day of the shooting.

Q. About what time did you get there?

A. I think it was about shortly after noon—probably 2 o'clock.

79 Q. Police station, you mean?

A. Yes, sir.

Q. You got there about two o'clock, you say, Mr. White?

A. Yes, sir.

Q. Was Hayes under arrest at that time?

A. Yes, sir.

Q. In the station at the fair grounds?

A. Yes, sir.

Q. Did you see him?

A. Yes, sir.

Q. Did you talk with him?

A. No; I tried.

Q. What was his condition in reference to sobriety at that time?

A. Apparently very much under the influence of liquor.

Q. Had you ever seen him before?

A. Not that I know of.

(Witness was not cross-examined.)

WILLIAM HAYES, being sworn, testified.

Direct examination by Mr. MCBRIDE:

My name is William Hayes. I am a brother of John Hayes. My business is a butcher. I have lived in St. Louis about twenty years. I am a man of family. I am younger than my brother. I have known him all my life. I heard of his shooting Mr. Mueller at the fair grounds in August, 1881. I heard of it the same day.

Q. Had you seen your brother shortly before that time?

A. Two months before that.

Q. You had seen him two months before that?

A. Yes, sir.

Q. You had not seen him for two months before that?

A. Sir?

Q. The last time you saw him was two months before the shooting?

A. Yes, sir.

Q. That was the last time you saw him?

A. That was the last time I saw him.

Q. What were his habits at the time you saw him, and prior to the last time you saw him?

A. His habits were he was pretty near drunk all the time.

Q. He was pretty near drunk all the time, you say?

(Objected to.)

80 By the COURT:

Q. I understand you that the last time you saw him was two months before the shooting?

A. Yes, sir.

Q. And that some time prior to that time and at that time he was drunk?

A. Yes, sir; at that time he was drunk and before.

Q. About how long a time?

A. About two months before the shooting I seen him. He was drunk. And I seen him two months before that again and he was drunk, and afterwards up till the shooting. I seen him the day that he shot this man, or that the people said he killed him, and he was drunk.

Q. What time of the day did you see him?

A. It was in the afternoon, between two and three o'clock.

Q. I understand you to say, that you saw him four months before the shooting and two months before the shooting, and on both of these occasions he was drunk?

A. Yes, he was drunk.

Q. And you saw him the afternoon of the shooting and he was drunk?

A. Yes, sir; he was drunk.

By Mr. McBRIDE:

Q. How many times, say, during the four months prior to the time when this man was shot did you see your brother?

A. Well, I seen him I suppose fifteen or twenty times.

Q. During the four months prior to the shooting?

A. During the four months.

Q. Was he drunk upon every occasion you saw him?

A. Yes, sir; he was.

Q. Do you know what kind of liquor he was in the habit of drinking?

A. Well, sir; he used to drink mixed liquor, both beer and whiskey.

Q. What effect upon his mind and memory and disposition did drunkenness have?

A. Well, as for his memory, he didn't have any at all, and his mind, he was always talking foolish when he was drunk, and when sober he would not remember anything at all about it.

Q. Would not remember anything that he had done?

A. No, sir; would not remember anything at all.

81 Q. In your opinion, in your judgment, was your brother of sound or unsound mind when under the influence of these drugs called whiskey and beer?

A. Well, I think that his mind was not sound.

Q. Was not sound?

A. Yes, sir.

Q. You say that after a debauch or drunken spree, he would not remember any thing?

A. He would not remember nothing at all.

Cross-examination by Mr. JOHNSON:

Q. You did not state what effect it had upon his disposition. What effect had it upon his disposition?

A. Well, sir, he was quiet; his disposition was always quiet; but when he was drunk, why, he was always talking foolish.

Q. Wasn't he acting foolish?

A. Yes, sir; he was.

Q. Didn't it make him quarrelsome?

A. No, sir.

Q. Wasn't he in the habit when he got drunk of getting into fights?

A. No, sir; not that I know of.

Q. Don't you know that he did get into fights and was in the habit of using guns and pistols?

A. No, sir; I don't.

Q. Do you state that of your own knowledge?

A. Yes, sir.

Q. Do you mean to say that his disposition was that of a quiet, peaceable man when he was drunk?

A. Yes, sir; as far as I seen him.

Q. I am not speaking of as far as you saw him, but what you know of his character Don't you know when he was in the habit of drinking that he was in the habit of getting into quarrels and very serious quarrels?

A. Not that I know of.

Q. Don't you know he was on a spree just a year prior to this that he had used a shot-gun against a citizen?

(Objected to; objection sustained.)

Q. You say you know nothing about that?

A. No, sir.

Q. You say that you had not seen him two months before this occurrence?

A. I had seen him two months before that occurrence.

Q. You hadn't seen him during the intervening time?

A. No, sir.

82 Q. Do you know where he was living at that time, those two months?

A. Yes, sir; he was living, I think, it was on Sullivan avenue, back of the fair grounds.

Q. Do you know what business he was doing during that two months?

A. No, sir; I don't.

Q. Do you know anything particularly or specially about his conduct during that two months?

A. No, sir.

Q. Don't?

A. Don't.

Q. You don't know, then, whether during that two months he was drinking or whether he was keeping sober?

A. Yes, sir; I know that he was keeping drinking.

Q. I am speaking of your own knowledge?

A. Yes, sir; of my own knowledge.

Q. Did you see him?

A. Yes, sir; I seen him.

Q. During that two months?

A. Yes, sir.

Q. I thought you stated to these gentlemen that you had not seen him for two months before the killing?

A. Yes, sir; I seen him two months before the killing; it was in June. He come to my house.

Q. I am speaking during that time. If you hadn't seen him you don't know whether he was drunk or sober?

A. Yes, sir; I seen him; I seen him at the stock-yards.

Q. I understood you to say that you hadn't seen him before the killing for two months?

A. Yes, sir; I seen him two months before the killing.

Q. Now, during that two months, from the time that you saw him two months before the killing, up to the time of the killing, was he drunk or sober?

A. Well, every time that I seen him he was drunk.

Q. Well, how often did you see him?

A. Well, sometimes may be I'd see him may be once a week, or perhaps I might see him two or three time in the week.

Q. How many days or weeks or months before your brother
83 was arrested for this murder, did you see him?

A. I seen him about four days before that. That is the last time I seen him.

Q. Where did you see him at that time?

A. I think I seen him at Kossuth avenue, near Garibaldi street.

Q. What was he doing?

A. He was just after coming out of a saloon that is there—grocery and saloon.

Q. Whose saloon was it?

A. I don't really know the man's name?

Q. Did you talk to him?

A. No, sir; I did not.

Q. Now, how long before that, how many days before that, had you seen him befo e?

A. Then I seen him, I guess, a week before that again.

Q. Where did you see him then?

A. I seen him coming from the stock-yards towards home.

Q. Coming from the stock-yards?

A. Yes, sir.

Q. Had he been to the stock-yards?

84 A. I seen him coming from there; leaving the stock-yards; I seen him coming home.

Q. Do you know whether he had been to the stock-yards?

Ans. I suppose he had been up there.

Mr. McBRIDE (to witness). Don't give your supposition. If you don't know, say so; if you do, say so.

WITNESS. I suppose he had been there.

Mr. McBRIDE. I don't want your supposition.

The COURT. Do you know that he was there?

WIT. No, sir; I don't really know that he was there.

By Mr. JOHNSON:

Q. What time in the day was it?

Ans. It was about three o'clock in the afternoon.

Q. Did you speak to him that day?

Ans. No, sir.

Q. What was his business?

Ans. His business was cattle-trader.

Q. You saw him on the street, I understood you say; is that correct?

Ans. I saw him leaving the stock-yards on the street; yes.

Q. Was there anybody with him that day?

Ans. Not when I seen him.

Q. That was about a week before the time you saw him last; when did you see him previous to that again; have you any recollection?

Ans. Then he came in my house somewheres in June or July. I could not exactly say.

85 Ques. What time did he come to your house at that time?

Ans. Well, it was about 8 or 9 o'clock in the morning. It was on a Sunday. I am living at Vandewater avenue and North Market; 2409 Vandewater avenue.

Ques. How far from where he lives or did live at that time?

Ans. I suppose about a mile and a half.

Ques. What did he come to your house for?

Ans. Just for to see me; to see my family.

Ques. Was he sober then?

Ans. No, sir; he was not.

Ques. How long did he remain at your house at that time?

Ans. I suppose about an hour. I wanted him to stay to dinner and he would not stay.

Ques. Did he give any excuse why he did not stay?

Ans. No, sir; said that he wanted to go home, that was all.

Whereupon court cautioned the jury and took a recess until 2 p. m.

After recess further proceedings in the case at bar were had as follows:

CHARLES BOYD, being sworn, testified.

Direct examination by Mr. MCBRIDE:

My name is Charles Boyd. I am living at 1210 North Seventh
86 st. I was born and raised in St. Louis. I am a brother of Captain Boyd, captain of police. I am working for Mr. Furber in the saloon business, southeast corner 5th and Christy ave. I know the defendent, John Hays. I judge I have know' him about four years, somewhere around there. I read an account in the papers of the shooting of Mueller by him in August, 1881. Prior to that time I had known him, it might be, a year and a half or two years; somewhere around there; I don't remember exactly.

Ques. During those years, a year and a half or two years, which preceeded the time of the shooting, where were you located; what were you doing?

Ans. I was in the saloon business; working for Fred. Pohlman, on the northeast corner of 5th and Christy avenue.

Q. You were there, and it was during that year and a half or two years that you knew him?

A. Yes, sir.

Q. That time of which you speak, a year and a half or two years or thereabouts, that was a period that immediately preceded the time of the killing of Mueller by this man?

A. Yes, sir.

Q. During that period did you see him often?

A. Well, yes; I used to see him two or three or four times a week, different days.

Q. Where did you see him?

A. He used to come in the saloon?
Q. For what purpose?
A. Indulge in drinking, I suppose.
Q. Drink?
A. Yes, sir; that is what he came in for.
Q. What did he generally drink?
A. He generally drank whiskey.
Q. About on an average how many drinks a day would he take there in that saloon?
A. Some days he would take three or four, and some days five or six or seven.
Q. That is, at that one saloon, of which you were barkeeper at that time?
A. Yes, sir; that much what I gave him myself.

Witness was not cross-examined.

MARY GALLOWAY, being sworn, testified.

Direct examination by Mr. MCBRIDE:

My name is Mary Galloway; I am a widow; I live at 908 Montgomery street; I have lived in St. Louis about 39 years; I know the defendant; I am slightly acquainted with him; I heard and read of his shooting a man by the name of Mueller at the fair grounds in August, 1881; I was living on Montgomery at that time; two months before the time of the shooting I was living on Broadway between Palm and Harrison; I moved from Broadway the 27th of July, 1881, to the best of my knowledge.

Ques. While you were living on Broadway, and up to the 27th of July, did you see or know this man?

Ans. Yes, sir; I saw him perhaps two or three times a day; I only knew Mr. Hayes 3 or 4 weeks, to the best of my knowledge; may be 5.

Ques. What is your best recollection and judgment as to the time that you knew him while you were living on Broadway?

Ans. Three or four weeks.

87 Ques. During those three or four weeks you think you saw him two or three times a day?

Ans. Yes, sir.

Ques. While you were living on Broadway?

Ans. Yes, sir; till I moved.

Ques. What was his condition during those four or five weeks with reference to sobriety?

Ans. Well, I could not say; the gentleman was pretty near all the time drinking; I think, pretty certain of it, too, intoxicated; he was pretty near all the time intoxicated every time I saw him.

Ques. Did you ever talk with him?

Ans. Well, I spoke to him, "Good morning," "Good evening," the time he passed; he was living next door; I would bid him the time of the day when he would go in, that was all.

Ques. Was your attention called to him?

Ans. Not particular.

Ques. How did you come to notice then that he was intoxicated every time you saw him?

Ans. He lived next door, and my front-door steps and his are next to one another; you could step from one to the other, and I could not help but see him.

Ques. And in that way you came to notice him?

Ans. Yes, sir.

Ques. Notice his condition?

Ans. Yes, sir.

Cross-examination by Mr. JOHNSON:

88 As I understood, he was boarding there on Broadway, between Palm and Harrison. There was two ladies there; one was Mrs. Woods and the other Mrs. Carr. I did not know that he had a wife. I did not know his wife at that time. I saw him there nearly every day. Mrs. Carr and Mrs. Woods and her little daughter lived there. I suppose he slept there. I did not see him sleeping there, because I was not in there. Mrs. Carr was a married lady. Her husband was not there.

Ques. At the time of the homicide was Mrs. Carr living there?

Ans. No, sir; they had moved away from there, they were out at the fair ground. I don't know anything about it only what I read in the paper. I was up on Montgomery, the same as I stated.

Ques. What was Mrs. Carr's name, if you know?

Ans. Mary.

Ques. You left Broadway in July, 1881?

Ans. Yes, sir.

Ques. How long before you left there had Hayes been living there with Mrs. Carr?

Ans. Well, from 4 to 5 weeks, as I stated, to the best of my knowledge. I could not tell exactly the day, but it was between that time.

Ques. Had you moved into that place before or after Hayes and Mrs. Carr came living there?

89 Ans. Oh, I had been living there 9 years before them.

Ques. Then it was your attention was directed to them?

Ans. Yes, sir.

Ques. Up to the time you left you saw him going and coming into that house?

Ans. Yes, sir.

Ques. What hours did you see him?

Ans. Well, the day-time. I saw him there as I was sitting on the steps of evenings. I didn't know what his business was. I supposed he was staying there as long as he was boarding there.

Ques. Who was keeping the boarding-house, Mrs. Carr or Mrs. Wood?

Ans. I could not say. The two ladies was living together and her little daughter.

Ques. What size child was this daughter of Mrs. Woods?

Ans. She was a little girl, I suppose, 9 or 10 years old. I don't know her age exactly; looked to be that.

Ques. During that time as you saw him going out and in, you noticed him to be intoxicated?

Ans. Yes, sir.

Ques. To what extent?

Ans. I am not a judge of a gentleman's being intoxicated.

Ques. What occurred after you left there you know nothing about, I suppose?

Ans. No, sir; I know nothing about.

90 Ques. You saw him afterwards, I suppose?

Ans. I never saw him until I saw him here in the Four Courts.

SUSAN DISMUKE, being sworn, testified.

Direct examination by Mr. MCBRIDE:

My name is Susan Dismuke; I live at 1415 Salsbury street; I have lived in St. Louis 16 years last August; I am a widow; I came from Ralls County, Mo.; I was born in Missouri; I lived on Broadway between Palm and Harrison from the 20th of June, 1881, until September 20th, 1881; I know Mrs. Galloway, this lady who was a witness here; she was a neighbor of mine at that time.

Ques. While you were living there, from June 20th, 1881, until Sep. 20th, 1881, had you any acquaintance with this defendant?

Ans. No, sir; only spoke to him sometimes; spoke to him in the yard.

Ques. How close to you did he live at that time?

Ans. He lived next door to me. He was not living there at the time he was arrested for shooting Mr. Mueller; I don't know how long he lived there; I knew him four or five weeks, I guess.

Ques. He lived there four or five weeks?

Ans. Yes.

Ques. Next door to you?

Ans. Yes. I could not say that he was there all the time.

91 Ques. He moved away before you did?

Ans. Yes, sir.

Ques. Now, during those four or five weeks that he lived next door to you, did you see him often; if so, how often?

Ans. Sometimes every day, sometimes twice a day.

Ques. What was his condition, his mental condition?

Ans. He was drinking all the time he lived there.

Ques. He was drinking all the time he lived there?

Ans. Yes, sir.

Ques. How do you know?

Ans. I guess I know a drunken man when I see him.

Ques. Well, what was his condition with reference to sobriety, was he sober or drunk?

Ans. Well, he was drunk.

Ques. Drunk?

Ans. Yes, he was drunk, his face was all swollen; looked wild out of his eyes.

Ques. Do you know what he drank?

Ans. I saw 'em carrying whiskey in there; I don't know whether he drank it or not.

Ques. How often?

Ans. Two or three and four times a day.

Ques. Who was carrying in the whiskey?

Ans. A little girl.

Ques. Did the little girl live in the house where he was stopping?

92 Ans. Yes, sir.

Ques. What made you think it was whiskey.

Ans. Because I know it was whiskey; it looked like whiskey. I saw her coming out of the bar-room with it. I suppose it was whiskey.

Ques. Could you see it through the bottle?

Ans. Of course I could see it through the bottle.

Ques. See them carrying anything else to the place?

Ans. Yes, sir; sometimes beer.

Ques. What was it generally?

Ans. Whiskey.

Ques. Did you ever see him sober at all during all that time?

Ans. I don't think I ever did.

Ques. I will ask you to state to these gentlemen what your judgment and opinion are with reference to the condition of his mind, whether it was sound and healthy or whether sane or insane during the time that you observed him every day or nearly every day?

Ans. Oh, I don't know; he looked to me like a drunken man; that is all I can tell you.

Ques. Did you speak to him?

Ans. I would say "Good morning" sometimes, or "Good evening," when I see him.

Ques. Have you now or did you then form any opinion as to whether the man was in his right mind or not?

93 Ans. Certainly, he could not be; a man who is drunk all the time never is in his right mind.

Cross-examination by Mr. JOHNSON:

Ques. You don't mean to say that a drunken man don't know what he is about?

Ans. I do. I lived with a man myself that was drunk, and I know while he was drunk he did not know what he was doing.

Q. You lived with a man?

A. I lived with my husband.

Q. You don't mean to say that a man because he is drunk don't know what he is about?

A. I don't think they do when they are real drunk.

Q. A man may be very full of liquor, however, and know he is doing wrong, may he not?

A. Well, I don't know whether they do or not?

Q. Well, that may be the case, may it not? It don't necessar'y follow because a man has got liquor in him that he don't know that he is doing wrong. You would not say that, would you?

A. No; I think if a man is real drunk I don't think he knows what he is doing.

Q. That is your opinion?

A. That is my opinion.

Q. When he's real drunk?

A. Yes.

94 Q. What do you mean when he is real drunk?

A. Well, when a man can drink 4 or 5 bottles of whiskey a day he is not sober.

Q. Do you mean that the man who goes around town and talks to his neighbors and attends to his business is drunk?

A. I mean when he is beastly drunk.
Q. When they lay down and stagger. Is that what you mean?
A. That is what I mean exactly.
Q. Did you ever see Hayes stagger on the street?
A. I never seen him on the street.
Q. Where did you usually see him?
A. When I seen him he was going out in the yard.
Q. Coming out in the back yard?
A. Yes, sir.
Q. Who was he living with.
A. He was living with a woman of the name of Mrs. Woods and Mrs. Carr. He was living there four or five weeks, I reckon. I never saw his wife. I never knew her. I never knew that he had a wife. I say this little girl took whiskey to the house. I saw her bring it to the house.
Q. Do you know whether the woman sent for it?
A. I don't know anything about it.
Q. Do you know whether they drank any of it, or either of them?
A. I know nothing about it.
Q. Do you know whether Mollie Carr drank any of it?
A. I don't know anything about her.
95 Q. Did you see her?
A. I would see her when I was out in the yard.
Q. Did you see Hayes with her?
A. No, sir; I never seen him with her in my life.
Q. Did you see her in the house?
A. No, sir; whenever I'd see her she was out in the yard.
Q. You speak of sending this child for whiskey and beer. Who sent for it?
A. I don't know who sent for it. I would see her going out to the bar-room. That's all I know about it.
Q. This girl's name was Woods, was it not?
A. No, sir; her name was Carr.
Q. Was the child Mrs. Carr's child?
A. Yes, sir.
Q. You supposed by that, seeing Mollie Carr's child going for whiskey and beer, it was for this man?
A. I know it was, because I seen him one day out in the yard drinking it. He drank it out of the bottle.
Q. Did you speak much with him?
A. No, sir; only to bid him "Good morning," or "Good evening."
Q. Where did you see him?
A. Out in the back yard.
Q. Would he be drunk at that time?
A. He looked so to me. His face was swollen and his eyes wild.
Q. Would he be staggering drunk?
A. Yes, sir.
Q. When you looked at him would be staggering from what he drank at that time or from the effects of a former drunkenness?
A. I didn't see him staggering, but I know he was drunk.
96 Q. You did not see him stagger?

A. No; I did not.
Q. Did you think he was drunk from his looks?
A. I think a man who is always drinking liquor is always under the influence of it.
Q. That was the opinion you formed of him?
A. Yes, exactly.

JOHN HAYES, being sworn, testified in his own behalf as follows:

Direct examination by Mr. MCBRIDE:

Q. Your name is John Hayes?
A. Yes, sir.
Q. You are the defendant in this case?
A. Yes, sir.
Q. You are charged with shooting and killing Philip Mueller near the fair grounds, at his saloon, on the 26th day of August, 1881, or thereabout. Do you understand that?
A. I do, sir.
Q. If you did shoot and kill that man, did you intend to kill him?
A. No, sir.
Q. Sir?
A. No, sir.
Q. You did not?
A. No, sir.

Cross-examination by Mr. JOHNSON:

Q. How old are you?
A. About 34 year' old.
Q. What has been your occupation?
(Objected to; objection sustained.)
Q. Did your business require you to carry a revolver?
(Objected to; objection sustained.)
Q. Do you know what a revolver is?
(Objected to; objection sustained.)
97 Q. Did you use a revolver in shooting Mr. Mueller?
A. I don't know, sir.
Q. You don't know?
A. No, sir.
Q. What did you shoot at him, if you shot at him at all, with?
A. I don't know, sir.
Q. You don't know whether or not you shot at him?
A. I do not, sir.
Q. Had you a revolver on at the time?
A. I don't know, sir.
Q. Do you know anything about it?
A. I do not, sir.
Q. Why do you state, then, that you don't know what you intended to do?
A. I said that I know nothing about the affair at all, sir, of killing the man.
Q. That is the way you put it—that you know nothing about it?
A. That is the way that I got it; yes, sir; that is the way it is buried in my mind.

Q. Then you cannot say what you intended to do the time you fired the pistol, if you fired it; is that so?

A. No, sir.

Q. You cannot?

A. No, sir; I cannot, sir.

Q. And you cannot swear if at the time whether you shot at all?

A. I know nothing about it, sir.

Q. Nor can you swear what your intention was?

A. No, sir; I had no intention at all; I know nothing about it.

Q. You know nothing about it?

A. I had no intention of killing the man, if the man is dead.

98 Q. As I understand it, you know nothing about it—is that so?

A. That is so, sir.

Q. Do you remember of drinking three or four glasses of beer before the shooting?

(Objected to; objection sustained.)

Q. Now, do you mean to say that you recollect nothing that transpired at that time?

A. No; I recollect nothing about it.

Q. Sir?

A. I recollect nothing about it.

Q. You recollect nothing that transpired at that time in the saloon?

A. No, sir.

Q. You do not?

A. I do not, sir.

Q. Do you recollect the time you went into the saloon?

A. No, sir.

Q. Do you recollect any parties that were there at the time that Mr. Mueller was shot?

(Objected to; objection sustained.)

Q. Your statement, as I understand it, is, now, that you do not recollect anything about it?

A. I do not, sir.

Q. Were you drunk or sober at the time?

A. I don't know; I suppose I must be very drunk; I have no recollection about it.

By the COURT:

Q. You first stated, in answer to your counsel, that if you shot him you did not intend to kill him?

Answer. No, sir.

Q. And you since say that you have no recollection. Now, do you mean, when you say to counsel that if you shot him you did not intend to kill him, do you mean to say that you have not any recollection of anything or of your intent, or do you mean to say that if you did shoot

99 him your pistol went off by accident; is that what you mean to say?

A. I mean to say, sir, that I had no intention of killing the man at all.

Q. Do you mean to say, now, to counsel that if you did shoot him that it was by an accident; is that what you mean to convey?

A. Yes, sir.

Whereupon the defense rests.

And thereafter the following named witnesses and evidence were introduced in rebuttal on the part of the State:

AUGUST WINKEL, being sworn, testified.

Direct examination by Mr. JOHNSON:

My name is August Winkle; I am a member of the Metropolitan police, and have been about 7 years and 4 months; I knew the defendant; I had known him previous to the homicide about one year.

Q. How frequently during that time did you see him, you suppose?

A. Well, it might have been 5 or 6 times.

By Mr. MCBRIDE:

Q. During that year?

A. Yes, sir.

By Mr. JOHNSON:

Q. How long prior to this homicide did you see him?

A. It might have been about three months.

100 Q. Did you see him the day of the homicide?

A. Yes, sir.

Q. Where did you see him?

A. I arrested him on near the corner of Grand avenue and Emily street, about a quarter past twelve.

Q. Who was he with?

(Objected to as having been gone into in chief; objection overruled; defendant's counsel then and there excepted at the time.)

A. He was with Mollie Carr.

Q. State to these gentlemen, at that time what was his condition so far as sobriety was concerned, or drunkenness?

A. Well, he appeared to be sober. He had the appearance of a man that had been drinking some, but from a distance, and when we arrested him, he appeared to be not very drunk.

Q. He was not very drunk?

A. No, sir; that is, you could not notice it on him.

Q. Did you notice any staggering or anything of that kind?

A. No.

Q. What passed between you at the time, if anything?

A. We rode up from behind him, jumped off our horses, and stopped him and put the handcuffs on him and took him towards the station.

Q. Did you have any conversation with him?

A. All the conversation we had, he asked what we wanted him

101 for, and we told him that we guessed he knew what we wanted him for, and he objected to have the handcuffs on; he would go; and Officer Puncheon said business was business and he better go. That is all that passed except some resistance he made on the way to the station.

Q. Made no further statement to you?

A. No, sir.

Q. That was all that he said?

A. Yes, sir.

Witness was not cross-examined.

Officer THOMAS PUNCHEON, being recalled, testified further, as follows:

Direct examination by Mr. JOHNSON:

Q. How long have you known Hayes?
A. Well, I have known him for 5 or 6 years, I guess.
Q. Knew him, that is, previous to this homicide?
A. Yes, sir.
Q. Did you see him frequently?
A. Yes, sir.
Q. How often were you in the habit of seeing him?
A. Well, I'd see him sometimes every day, every two or three days, at least, two or three times a week I'd see him.
Q. How long before this transaction was it that you saw him last?
A. I think it was just the day before that I saw him.
Q. And then, before that day, how long previously had you seen him?

102 A. Well, as I say, it was pretty much every day; I was right there on the beat where he was living. I'd see him almost every day.

Q. Now, you were present when he was arrested, were you not?
A. Yes.
Q. Took part in the arrest, I understand?
A. Yes, sir.
Q. Will you state to these gentlemen what was his condition as to drunkeness or sobriety at that time?

(Objected to, witness having been interrogated in regard to it in chief; objection overruled; defendant's counsel then and there excepting at the time.)

A. Well, when we saw him walking along the street he walked very straight, he didn't stagger any as I could notice, but still, at the same time, you could see that the man had been drinking, but he walked along very good with us.
Q. Well, was he sober?
A. No, sir; I would not say the man was duly sober.
Q. Well, was he drunk?
A. He aint what I would term "drunk" either; at least he was not, because the man could stand on his feet and walk along very well.
Q. From what you saw of him at the time and from what you saw of him previously, could you state to these gentlemen at the time you arrested him that he was in a condition to know what he was about?
A. From my judgment of him, he did, yes, sir.

Witness was not cross-examined.

103 Dr. JOHN N. FRANK, being recalled, testified further as follows:

Direct examination by Mr. JOHNSON:

I saw the defendant on the day of the killing in the afternoon, between 3 and 4 o'clock, I think, I saw him in the fair ground calaboose.
Q. Did you speak to him?
A. Just a few words.
Q. Will you please state to these gentlemen what was his condition at that time as to sobriety or drunkenness?

A. At the time I saw him in the calaboose in the fair ground police station, he was sober, apparently recovering from the effects of drink. May I explain how I found him?

Q. Yes, sir.

A. He was lying on the bench on the inside and I was on the outside. He had his feet toward me, and I called to him and he raised himself on his elbow.

(Objected to as not in rebuttal; objected overruled; defendant's counsel then and there excepted at the time.)

Q. Go on, doctor.

A. As I said, when he raised himself partly on his elbow, partly sitting, is when I got a view of his face. It was hot and he was perspiring rather freely, but was sober.

Q. State what conversation passed between you.

(Objected to as not in rebuttal; objection overruled; defendant's counsel then and there excepted at the time.)

104 A. When I came to the bars I called him by name and told him to get up, or sit up; I wanted to see or talk to him. When he got up he said, "Who are you?" I told him that I was the coroner. He then swore and used some very foul language toward me, which I dislike to repeat, and I left him.

Q. State all that occurred. What did he say?

A. When I told that I was the coroner, he said, "Go to hell, you son of a bitch," and I turned and left.

Q. Now, from his appearance and conduct and conversation, did you form an opinion, or can you give us an opinion, as to whether the man, at the time, was rational or not?

A. It is my opinion that he was rational.

Cross-examination by Mr. McBRIDE:

Q. That is all you said to him and all he said to you?

A. Yes.

By Mr. JOHNSON:

Q. One further question: You saw him again the next day at the inquest, I believe?

A. Yes, sir.

Q. Any change in him at that time?

A. No. He seemed to be a little more collected and calm. He was not perspiring like he was in the cell at the calaboose, and not using such language.

By Mr. McBRIDE:

Q. You did not go inside of the cell, where the man was?

A. No, sir.

105 Q. Just went to the bars and told him to get up, you wanted to see him, wanted to talk with him?

A. I went to the bars and called him by name, and asked him to sit up, or stand up, I don't remember which, that I wanted to see him. He was lying down on the bench, and he raised on his elbow. He did not get up and come to the bars.

Q. How long were you there?

A. Probably three to five minutes.
Q. And it was while he was leaning upon his elbow you got a look at his face?
A. Yes, sir.
Q. You did not go into the cell?
A. No, sir.
Q. You never saw him before?
A. No, sir.
Q. Knew nothing of his life or habits?
A. No, sir.

Whereupon the court cautioned the jury and adjourned until Tuesday, January 13th, 1884, at 10 o'clock a. m.

TUESDAY, *January 13th*, 1884.

Court met pursuant to adjournment.
Present, as on yesterday.
Further proceedings in the case at bar were had as follows:
Counsel for State offered to read in evidence, for the purpose of impeaching the credibility of the defendant, the record of former conviction for an assault with intent to kill. Defendant's counsel waives formal proof of the record, but objects to the introduction of the record of conviction.

106 Which objection was by the court overruled. To which ruling defendant's counsel then and there excepted at the time.

Whereupon counsel for the State read in evidence from page 470 of Record No. 20 of the St. Louis criminal court, bearing date November 18th, 1879, as follows:

"State of Missouri, plaintiff, vs. John Hays, defendant, on an indictment for an assault to kill. This day comes the circuit attorney, who represents the State, and the defendant comes in his own proper person and by attorney; thereupon, on motion of the circuit attorney, the defendant is arraigned upon said indictment, and the same being read to him, says that he is not guilty as charged therein, and for trial puts himself upon the country and the circuit attorney does the same, and both parties being ready for trial, it is ordered that a jury come; thereupon came a jury, to wit, Michael Flaherty, Adam Diefenbach, jr., Peter Rembor, Stephen H. Rush, Barney Schwertering, Joseph Moeller, Christian J. Schmidt, Gustaves Holt, Caspar Soeding, Jacob Bischoff, Edward Mackey, and Frank Morran, twelve good and lawful men, who, being duly elected and tried and sworn the issues herein between the State of Missouri, plaintiff, and John Hays, defendant, well and truly to try and a true verdict render, according to the evidence: thereupon the trial of this case proceeds,

107 and the testimony of the witnesses being heard and the same concluded, thereupon the jury receive their instructions from the court, and the arguments of the counsel being heard, and the same concluded, the case is submitted to the jury for their verdict in the premises, and they retire to consider thereof, in charge of a deputy sheriff, who has been duly sworn to keep them together in the rooms set apart for the juries of this court, and not to permit any one to speak or communicate with them, nor to do so himself without leave of court, or to ask them whether they have agreed upon a verdict (oath of officer filed); and being agreed among them-

selves upon said verdict return into court and render the following as their verdict, to wit:

"The State of Missouri vs. John Hays. We the jury in the above entitled cause find the defendant guilty as charged in the indictment, and assess his punishment at imprisonment in the city jail for a term of six months. Stephen H. Rush, foreman."

Counsel for State offered to read in evidence the record of the judgment in the above-mentioned case.

The COURT. Any objection to the face of the judgment?

Mr. MCBRIDE. The same objection that I made before, your honor, with the additional objection, that any matter not pertaining to the
108 judgment which is based upon the verdict itself is inadmissible, and I object to its being read.

(Which objection was by the court overruled; to which ruling defendant's counsel then and there excepted at the time.)

Whereupon counsel for State read in evidence from page 97, Record No. 21, of the St. Louis criminal court, bearing date April 5th, 1880, as follows:

"State of Missouri, plaintiff, vs. John Hays, defendant. On indictment for assault to kill. This day the defendant, being in custody, is brought into court by the sheriff; thereupon the court overrules the motion for a new trial herein, and sustains the motion to commute the term of six months jail assessed against defendant, and doth commute said term of six months jail assessed against defendant to a fine of one hundred dollars. It is therefore considered by the court that said defendant, John Hays, for his offence of assaulting and wounding another in pursuance of the verdict rendered against him and the commutation thereof, pay to the State of Missouri, for the use of the city of St. Louis, a fine of one hundred dollars; that he pay the costs of this prosecution, and stand committed until this sentence be complied with; and it is ordered by the court that
109 said John Hays enter into bond to keep the peace and be of good behavior towards all people of the State of Missouri, and particularly towards Charles Gaeslin, in the sum of one thousand dollars for and during a period of two years from date.

"Thereupon said John Hays enters into said bond to keep the peace in the sum of one thousand dollars, with Benjamin T. Knapp and Thomas P. Grasty, as sureties, which said bond is approved by the court and is ordered filed."

To which evidence in rebuttal, the defendant objected as illegal and incompetent; which objection the court overruled, and to which ruling the defendant by his counsel then and there, at the time, duly excepted.

This was all the evidence in the case.

110 And thereupon the court of its own motion gave the following instructions to the jury, to wit:

GENTLEMEN OF THE JURY:

The indictment charges that the defendant at this city and State, on the 26th day of August, 1881, with a pistol, shot and killed Phillip Mueller, and that he did so wilfully, premeditatedly, deliberately, and of his malice aforethought.

The defendant says he is not guilty.

You have heard the evidence. Upon the evidence and these instructions you are to determine whether or not the defendant is guilty of murder in the first degree; and, if not guilty of murder in the first degree, whether or not he is guilty of manslaughter in the fourth degree.

If you shall believe from the evidence that the defendant at the time and place mentioned in the indictment, with a pistol, shot and killed Philip Mueller, and that he did such shooting and killing wilfully, premeditatedly, deliberately, and of his malice aforethought, you will find him guilty of murder in the first degree. Unless you so believe, you will find him not guilty of murder in the first degree.

111 "Wilfully" means intentionally; not by accident.

In order to convict defendant of murder in the first degree, you must believe from the evidence that the defendant not only shot Mueller intentionally, but that he so shot him intending to kill him.

In this connection, however, you are instructed that in the absence of qualifying facts and circumstances a person is presumed to have intended the natural, ordinary, and probable result of his acts.

Wherefore, if you shall believe from the evidence that the defendant intentionally shot Mueller in a vital part with a deadly weapon, to wit, a loaded pistol, from which death ensued, you will find that he intended to kill him unless the facts and circumstances given in evidence show to the contrary.

"Premeditatedly" means thought of beforehand any length of time, however short. If the defendant thought of shooting and killing Mueller, and there shot and killed him, such shooting and killing was premeditated.

"Deliberately" means done in a cool state of the blood, not in sudden passion, engendered by a lawful or some just cause of provocation, and the court instructs you that in this case there is no evidence tending to

112 show the existence of any such passion or provocation.

By the term "malice" is meant that condition of mind which prompts one man to take the life of another without any legal justification or excuse for it; and by "malice aforethought" that the act of killing which this condition of mind prompts one to commit, must have been premeditated.

To constitute a homicide a murder in the first degree, it must contain and have inherent in it all the elements of wilfulness, premeditation, deliberation, and malice aforethought as heretofore defined, and the State must prove their existence beyond a reasonable doubt, but their existence may be inferred from the facts and circumstances connected with the killing, and if they did exist a moment before the killing it is sufficient.

Wherefore, if you shall believe from the evidence that the defendant at the time and place mentioned in the indictment pointed a loaded pistol at Mueller, and that while so pointed defendant unintentionally shot off and discharged the same, whereby Mueller was killed, you will acquit him of murder in the first degree. And in that case, if you shall further

113 believe from the evidence that defendant at the time of such unintentional shooting was not insane, as hereinafter explained, you will find him guilty of manslaughter in the fourth degree.

Intoxication produced by strong drink recently taken is no excuse for crime. But insanity, whether it be produced by drink or by any other

cause, is a perfect defense to any criminal charge. Hence the defendant may have done the shooting complained of and still be innocent of any offense against the law. If at the time of the shooting, he was, in fact, so insane that he could not and did not understand or did not comprehend the nature or character of the act, though he may have committed it, he is not guilty.

Insanity is a condition of the mind the result of physical disease. As understood by the law it is not the disease itself, but the effect on the mind produced by disease.

In other words, insanity is a derangement of the mental and moral faculties of the man which is the natural and necessary result of some disease of one or more of those parts of the body which constitute the organ of the mind. As applied to this case it is such a perverted or deranged condition of some one or more of these faculties, as rendered this de-
114 fendant incapable, at the time of the alleged shooting, of distinguishing between right and wrong and of knowing the right from the wrong of that particular act. If at that time he was actually so insane as this, he is not responsible for his act, however brutal or atrocious it may have been; otherwise he is responsible for it if he committed it as charged.

Insanity is either partial or complete. Complete alienation always excuses; partial insanity does not always excuse. One may be actually partially insane and yet fully responsible for his criminal acts. In such cases the law does not excuse, unless the derangement is so great that it actually renders the person incapable at the time of its commission of distinguishing between right and wrong, and of knowing the right from the wrong in respect to the particular act charged and proved against him. This is the test prescribed by the law, and this is the test which the court directs you to apply in this case.

To establish the insanity of the defendant, positive and direct proof of it is not required. To entitle him to an acquittal by reason of his insanity circumstantial evidence, which reasonably satisfies your minds of it, is sufficient.

115 The law presumes every person who has reached the years of discretion to be of sound mind, and this presumption continues until the contrary is shown; so that when, as in this case, insanity is pleaded as a defense to a criminal charge, the fact of the existence of such insanity at the time of the commission of the act complained of must, before you can acquit on that ground, be established by the evidence to your reasonable satisfaction, and the burden of proving this fact rests with the defendant.

The burden of proving the guilt of the defendant rests with the State, and, to entitle the prosecution to a verdict of guilty, it must prove him guilty beyond a reasonable doubt. But in respect to the sanity of the accused, the law aids the prosecution with this presumption. On the other hand, to entitle the defendant to a verdict of not guilty by reason of his insanity, the law requires him to prove it, not beyond a reasonable doubt, but only to your reasonable satisfaction.

From all this it follows that, although you may believe and find that the defendant did the shooting alleged, yet if from the evidence you further find that at the time he did it he was in such an insane condition of

116 mind that he could not and did not know that he was doing wrong, or that he could not and did not understand or comprehend the nature or character of the act, then, and in that case, such shooting was not, either in law or in fact, malicious or felonious, and you ought to acquit him on the ground of insanity, and by your verdict so say.

If on the whole case you entertain a reasonable doubt of the guilt of the defendant, the law gives to him benefit or advantage of it, and entitles him to a verdict on that ground. But if of his guilt you are convinced by the evidence beyond a reasonable doubt, your duty is to convict him and to convict him of that offense of which you believe him guilty; and if of his guilt you are not by the evidence thus clearly convinced, your duty is to acquit him. By the term "convinced beyond a reasonable doubt" is meant convinced to a moral certainty.

No. 13.

(Given at request of defendant).

You are the sole judges of the credibility of the witnesses, including the defendant, and of the weight and value to be given to their testimony.

In determining such credibility, weight, and value, you should take
117 into consideration the character of the witnesses; his or her manner on the witness stand; his or her interest, if any, in the result; his or her relation to, or feelings for or against the defendant or the deceased; the probability or improbability of his, or her statements, as well as all the facts and circumstances given in evidence. And in this connection you are instructed that if you shall believe from the evidence that any witness has been convicted and adjudged guilty of a crime, you may take the fact of such conviction and judgment into consideration for the purpose of (and for no other purpose) *of* determining what credit you will give to the testimony of such witness.

If you find the defendant guilty of murder in the first degree, you will so say in your verdict; with the punishment therefor you have nothing to do.

If you find the defendant guilty of manslaughter in the fourth degree you will so say in your verdict, and therein assess his punishment at imprisonment in the penitentiary for two years, or by imprisonment in the county jail not less than six months, or by a fine of not less than
118 five hundred dollars, or by both a fine of not less than one hundred dollars and imprisonment in the county jail not less than three months.

* * * * * * *

To the giving of which instructions, except the 13th, for which defendant asked, the defendant by his counsel then and there at the time duly excepted.

After which the defendant, at the proper time, asked the court to give the jury the following instructions, numbered one to four, inclusive, to wit:

I.

Instructions refused.

"The court instructs the jury that to justify a verdict of guilty of murder in the first degree in this case, there must be proven by the evidence

to their reasonable satisfaction a specific and definite purpose and intent on the part of the defendant to kill the deceased, not merely to wound, frighten, disfigure, or disable him, but to take his life; and if, therefore, the jury, after considering all the facts in the case, have a reasonable doubt whether or not the defendant, when he shot the deceased, had and entertained a definite and specific purpose and intent to kill him, they cannot find the defendant guilty of murder in the first degree.

2.

119 The court instructs the jury that if they find and believe from the evidence that defendant, for a long time previous to the homicide charged, and without reference thereto, had been addicted to habitual drunkenness, and that at the time of said homicide defendant was still laboring under the effects of said drunken habits, and by reason thereof was in such a perverted mental condition as to be incapable of forming a specific and definite intent to kill, and did not so form or entertain such a specific and definite intent, they cannot find him guilty of murder in the first degree.

3.

The court instructs the jury that, while the mere condition of drunkenness existing at the time of the commission of the offense is no excuse therefor, yet, if they find and believe from the evidence that the defendant for a long time previous to the homicide charged, and without reference thereto, had been addicted to habitual drunkenness, and that at the time of said homicide defendant was still laboring under the effect of said drunken habits, and was so drunk as to be incapable of forming a
120 specific and definite intent to kill, and did not so form or entertain such a specific and definite intent, they cannot find him guilty of murder in the first degree.

4.

The court instructs the jury that if they believe that at the time of the killing charged in the indictment the mental and moral faculties of the defendant were so perverted from their normal condition by the habitual use of alcoholic liquors as to prevent him from understanding the nature and consequences of the act he was about to commit, and such perverted and diseased condition of his mental and moral faculties was inconsistent with deliberation as charged in the indictment, so that he could not have acted with deliberation, the jury should find the defendant guilty of murder in the second degree and assess the punishment at imprisonment in the penitentiary for a term not less than ten years.

* * * * * * *

Which the court refused to give, and to which action of the court in refusing said instructions the defendant by his counsel then and there and at the time duly excepted.

121 And afterwards, to wit, on the 13th day of January, 1885, the jury found the defendant guilty of murder in the first degree.

Within four days thereafter, to wit, on the 17th day of January, 1885, the defendant filed a motion to set aside the verdict and for a new trial, in the following words, to wit:

Motion for new trial.

In the St. Louis criminal court. January term, 1885.

STATE OF MISSOURI
vs.
JOHN HAYES.

Now at this day comes the said defendant, and by his attorney moves the court to set aside the verdict of the jury rendered in this cause, and to grant him a new trial, for the following reasons, to wit:

1. Because said verdict is against the evidence and the weight of evidence.
2. Because said verdict is against the law.
3. Because the court erred in admitting illegal and incompetent evidence at the trial on the part of the State.
4. Because the court erred in refusing to admit at the trial legal and competent evidence offered on the part of the defendant.
5. Because the court erred in giving illegal and improper instructions to the jury.

122 6. Because the court erred in refusing to give legal and proper instructions to the jury asked for by the defendant.

7. Because the court erred in overruling defendant's motion to set aside and vacate the order made and entered of record at the January term 1882, appointing and requesting the honorable Charles G. Burton, judge of the 25th judicial circuit of this State, to hear and determine defendant's application for change of venue then pending, and to try said cause.
8. Because the court erred in overruling defendant's motion to limit and restrict the State to eight peremptory challenges in this cause, and fifteen peremptory challenges were allowed by the court and made on the part of the State.
9. Because the court erred in assuming and taking judicial cognizance of as a fact, that the city of St. Louis at the time said fifteen challenges were allowed and made, had a population of over one hundred thousand inhabitants—there being no proof or evidence whatever offered in the case in support of said assured fact.
10. Because the honorable Charles G. Burton, judge of the twenty-fifth judicial circuit of the State of Missouri, who tried the said cause, had no legal power, authority, or jurisdiction to try the same, and that

123 the honorable G. S. Van Wagoner, the then presiding and lawfully elected judge of said court, alone had power or jurisdiction to try said cause.

11. Because so much of section 1902 of the revised statutes of the State of Missouri as allows to the State fifteen peremptory challenges in this and similar cases is unconstitutional, in that it is in violation of and inconsistent with section 53, article 4, of the constitution of the State of Missouri.
12. Because so much of section 1902 of the revised statutes of the

State of Missouri as allows the State in this and similar cases fifteen peremptory challenges is in violation of and inconsistent with section 1, article 14, of the amendments to the Constitution of the United States.

JOHN HAYES.
By his attorney, JAMES J. McBRIDE.

Which motion for a new trial having been heard and considered, was by the court overruled; to which decision of the court in overruling said motion for a new trial the defendant, by his counsel, then and there and at the time duly excepted.

And thereupon, and after defendant's motion for a new trial had been overruled by the court, to wit, 31st day of January, 1885, and
124 on the same day the defendant filed his motion in arrest of judgment in words following, to wit:

Motion in arrest.

STATE OF MISSOURI
vs.
JOHN HAYES. } Murder in the first degree.

Now comes said defendant, and by his attorney moves the court in arrest of judgment, and that no judgment be rendered upon the verdict found by the jury in this cause, for the following reasons, to wit:

1. Because the order made by this court at the January term, 1882, appointing and designating the honorable Charles G. Burton, judge of the 25th judicial circuit of the State of Missouri, to decide defendant's application for a change of venue, then pending, and to try said cause, was illegal, null, and void.

2. Because so much of said order as aforesaid as purported or pretended to authorize the said Judge Burton to try said cause was illegal, null, and void.

3. Because the application for a change of venue made by defendant at the January term, 1882, of this court, having been withdrawn prior to the trial of this cause by Judge Burton, to wit, on the 16th day of December, 1885, as appears of record, the said Judge Burton was legally
125 incompetent, and had no lawful power, right, or jurisdiction to try said cause.

4. Because the St. Louis criminal court, as constituted at and during the trial of said cause, had no lawful right, power, or jurisdiction to try the same.

5. Because the indictment is insufficient to sustain a verdict.

6. Because the indictment is insufficient to sustain a judgment.

JOHN HAYES,
By his attorney, JAMES J. McBRIDE.

Which motion in arrest of judgment having been heard and considered by the court, was by the court overruled; to which decision of the court overruling said motion the defendant, by his counsel, then and there at the time duly excepted.

And thereupon defendant, by his counsel, presented this his bill of exceptions, and prayed that the same may be signed, sealed, and made part of the record in this cause, which is done accordingly this 31st day of January, 1885.

(Signed) CHARLES G. BURTON, [SEAL.]
Judge of the 25th judicial circuit of the State of Missouri, sitting and acting as judge of the Criminal Court of St Louis, in the above cause.

126 Thereupon defendant prays an appeal from the judgment here rendered against him to the supreme court of the State of Missouri, and files his affidavit in support thereof, and the court doth grant said appeal.

Also on said 31st day of January, 1885, and before appeal was taken in this cause, the defendant presented to honorable Garret S. Van Wagoner (he being at the time acting and presiding as judge) his bill of exceptions, and prayed that the same might be signed, sealed, and made part of the record in this cause, which was accordingly then and there and at the time done. Said bill of exceptions is as follows, to wit:

2nd bill of exceptions.

In the St. Louis criminal court, January term, 1885.

STATE OF MISSOURI
vs.
JOHN HAYES. } Murder in the first degree.

Be it remembered that on the 2nd day of January, A. D. 1885, the honorable Garret S. Van Wagoner, the regularly elected and qualified judge of the St. Louis criminal court, then officially occupying the bench, the following proceedings were had in said cause, to wit:

The defendant filed his written motion praying the court to
127 vacate and set aside the order made by the court and entered of record at the January term, 1882, the honorable Henry D. Laughlin then being judge of said court, whereby the honorable Charles G. Burton, judge of the 25th judicial circuit of the State of Missouri was designated and appointed to decide defendant's application for a change of venue, then pending, and to try said cause, which motion is in words following, to wit:

In the St. Louis criminal court, January term, 1885.

STATE
vs.
JOHN HAYES.

Now at this day comes the said defendant, and by his attorney moves the court to vacate, set aside, and annul the order heretofore made by this court, and entered of record January 20th, 1882, designating, appointing, and requesting Judge Burton, of the twenty-fifth judicial circuit of the State of Missouri, to try said cause, and to hear and determine defendant's

application for a change of venue, then pending, because the reason for making the order no longer exists, defendant's application for a change of venue having been heretofore withdrawn, as appears by the records of this court, and the honorable Henry D. Laughlin, who was rendered disqualified to try said cause being no longer judge of this court.

JOHN HAYES,
By his attorney, JAMES J. McBRIDE.

BAR ASSOCIATION

128 Which said motion was duly presented by defendant's counsel to the court for its action thereon, and the court refused to entertain said motion, or to act upon or decide the same, although requested by defendant's counsel so to do, the court officially stating at the time that he had no power or jurisdiction in the matter, and that right and authority to decide the motion belonged exclusively to Judge Burton, who had been appointed to try the cause; to which ruling and refusal of the court to entertain or pass upon said motion the defendant then and there at the time duly excepted. And thereupon the defendant, by his counsel, presented this, his bill of exceptions, and prayed that the same be signed, sealed, and made a part of the record in this cause, which is done accordingly this 31st day of January, A. D. 1885.

[SEAL.] GARRET S. VAN WAGONER,
Judge of the St. Louis Criminal Court.

STATE OF MISSOURI,
City of St. Louis, ss:

I, Patrick M. Staed, clerk of the St. Louis criminal court, certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the cause of the State of Missouri, plaintiff,
129 vs. John Hayes, defendant, as fully as the same appears of record and on file in my office.

Witness my hand and seal of said court hereto affixed at office in the city of St. Louis, this 24th day of February, A. D. 1885.

[SEAL.] PATRICK M. STAED,
Clerk of the St. Louis Criminal Court.

In the supreme court of Missouri.

And afterwards, to wit, at the October term, A. D. 1884, of the supreme court of Missouri, and on the 2d day of March, A. D. 1885, the following further proceedings were had in said cause, to wit:

STATE OF MO. RESP.
vs.
JOHN HAYES, APP.

App. from St. Louis crim. ct.

Now at this day it is ordered that the execution of the judgment and sentence of the said St. Louis criminal court, passed upon the appellant herein, be stayed until the further order of this court.

And afterwards, to wit, at the October term, A. D. 1885, of said court,

And thereupon defendant, by his counsel, presented this his bill of exceptions, and prayed that the same may be signed, sealed, and made part of the record in this cause, which is done accordingly this 31st day of January, 1885.

(Signed) CHARLES G. BURTON, [SEAL.]
Judge of the 25th judicial circuit of the State of Missouri, sitting and acting as judge of the Criminal Court of St Louis, in the above cause.

126 Thereupon defendant prays an appeal from the judgment here rendered against him to the supreme court of the State of Missouri, and files his affidavit in support thereof, and the court doth grant said appeal.

Also on said 31st day of January, 1885, and before appeal was taken in this cause, the defendant presented to honorable Garret S. Van Wagoner (he being at the time acting and presiding as judge) his bill of exceptions, and prayed that the same might be signed, sealed, and made part of the record in this cause, which was accordingly then and there and at the time done. Said bill of exceptions is as follows, to wit:

2nd bill of exceptions.

In the St. Louis criminal court, January term, 1885.

STATE OF MISSOURI
vs.
JOHN HAYES. } Murder in the first degree.

Be it remembered that on the 2nd day of January, A. D. 1885, the honorable Garret S. Van Wagoner, the regularly elected and qualified judge of the St. Louis criminal court, then officially occupying the bench, the following proceedings were had in said cause, to wit:

127 The defendant filed his written motion praying the court to vacate and set aside the order made by the court and entered of record at the January term, 1882, the honorable Henry D. Laughlin then being judge of said court, whereby the honorable Charles G. Burton, judge of the 25th judicial circuit of the State of Missouri was designated and appointed to decide defendant's application for a change of venue, then pending, and to try said cause, which motion is in words following, to wit:

In the St. Louis criminal court, January term, 1885.

STATE
vs.
JOHN HAYES.

Now at this day comes the said defendant, and by his attorney moves the court to vacate, set aside, and annul the order heretofore made by this court, and entered of record January 20th, 1882, designating, appointing, and requesting Judge Burton, of the twenty-fifth judicial circuit of the State of Missouri, to try said cause, and to hear and determine defendant's

application for a change of venue, then pending, because the reason for making the order no longer exists, defendant's application for a change of venue having been heretofore withdrawn, as appears by the records of this court, and the honorable Henry D. Laughlin, who was rendered disqualified to try said cause being no longer judge of this court.

JOHN HAYES,
By his attorney, JAMES J. McBRIDE.

PHILADELPHIA BAR ASSOCIATION

128 Which said motion was duly presented by defendant's counsel to the court for its action thereon, and the court refused to entertain said motion, or to act upon or decide the same, although requested by defendant's counsel so to do, the court officially stating at the time that he had no power or jurisdiction in the matter, and that right and authority to decide the motion belonged exclusively to Judge Burton, who had been appointed to try the cause; to which ruling and refusal of the court to entertain or pass upon said motion the defendant then and there at the time duly excepted. And thereupon the defendant, by his counsel, presented this, his bill of exceptions, and prayed that the same be signed, sealed, and made a part of the record in this cause, which is done accordingly this 31st day of January, A. D. 1885.

[SEAL.] GARRET S. VAN WAGONER,
Judge of the St. Louis Criminal Court.

STATE OF MISSOURI,
City of St. Louis, ss:

I, Patrick M. Staed, clerk of the St. Louis criminal court, certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the cause of the State of Missouri, plaintiff,
129 vs. John Hayes, defendant, as fully as the same appears of record and on file in my office.

Witness my hand and seal of said court hereto affixed at office in the city of St. Louis, this 24th day of February, A. D. 1885.

[SEAL.] PATRICK M. STAED,
Clerk of the St. Louis Criminal Court.

In the supreme court of Missouri.

And afterwards, to wit, at the October term, A. D. 1884, of the supreme court of Missouri, and on the 2d day of March, A. D. 1885, the following further proceedings were had in said cause, to wit:

STATE OF MO. RESP.
vs.
JOHN HAYES, APP.

App. from St. Louis crim. ct.

Now at this day it is ordered that the execution of the judgment and sentence of the said St. Louis criminal court, passed upon the appellant herein, be stayed until the further order of this court.

And afterwards, to wit, at the October term, A. D. 1885, of said court,

and on October 31st, 1885, the following further proceedings were had in said cause, to wit:

130 * * * * * * *

STATE OF MO., RESP.,
vs.
JOHN HAYES, APP.

* * * * * * *

Comes now the said respondent, by attorney, and upon its motion it is ordered that these causes be advanced on the docket and set for hearing on November 16th, 1885.

Which said motion filed in this cause is in words and figures following, to wit:

In the supreme court, October term, 1885.

THE STATE OF MISSOURI, RESPONDENT,
against
JOHN HAYS, APPELLANT. } Murder in 1st degree.

Appeal from St. Louis court of appeals.

Motion to advance cause.

Now comes the attorney-general and shows to the court that the defendant, John Hays, was indicted in the St. Louis criminal court at the October term thereof, for the year A. D. 1881, for the crime of murder in the 1st degree, was tried and convicted. He appealed to the St. Louis court of appeals, where the judgment was affirmed, from which he
131 appealed to this court, where the cause was reversed and remanded. (81 Mo., 574.) At the January term, 1885, of the St. Louis criminal court, defendant was again tried and convicted of murder in 1st degree. He thence appealed to this court. The transcript was filed in this court March 2, 1885. The execution of sentence was set for March 20th, 1885.

Owing to the nature and character of the crime charged, and that the defendant is now and has been confined in the St. Louis jail since the said conviction last named, it is therefore respectfully submitted that said cause be advanced on the docket and set for hearing at as early day as will meet the convenience of the court.

B. G. BOONE,
Att'y-General.

And afterwards, to wit, at the same term of said court, and on the 16th day of November, A. D. 1885, the following further proceedings were had in said cause, to wit:

STATE OF MO., RESP.,
vs.
JOHN HAYES, APP.

App. from St. L. crim. c't.

Come now the parties, by attorneys, and submit this cause to the court on briefs.

Ordered that the said appellant have 30 days in which to file brief.

132 And afterwards, to wit, on the 26th day of January, A. D. 1886, the following further proceedings were had in said cause, to wit:

133 THE STATE OF MISSOURI, RESPONDENT,
vs.
JOHN HAYES, APPELLANT.

Appeal from the St. Louis criminal court.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid in form aforesaid by the said St. Louis criminal court rendered be in all things affirmed and stand in full force and effect. And it is further considered and adjudged by the court that the said respondent recover against the said appellant its costs and charges herein expended, and have therefor execution. And it is still further considered and adjudged by the court that the judgment and sentence of the St. Louis criminal court passed upon the said John Hayes, appellant herein, on the 31st day of January, A. D. 1885, be in all things executed by the sheriff of the city of St. Louis on the 5th day of March, A. D. 1886. (Opinion filed.)

134 Which said opinion is in words and figures following, to wit:

THE STATE OF MISSOURI, RESPONDENT,
vs.
JOHN HAYES, APPELLANT.

Appeal from St. Louis criminal court, Hon. Charles G. Burton, judge.
Opinion of the court.

This cause is here for the second time. The result of the defendant's first appeal and our rulings then made are reported in 81st Mo., 574 et seq. The defendant is charged in the indictment with the murder of Philip A. Mueller, & after our reversal of the judgment has been tried again, the trial resulting in his conviction of & sentence for murder in the first degree; the second trial resulting in the same way as did the first one.

This appeal presents but two points for consideration: First, whether Judge Burton had jurisdiction to try the cause; second, whether section 1902 R. S., 1879, is a valid law.

I. Relative to the first point: The defendant, after the judgment of reversal & the cause was sent back for a new trial, withdrew his applecation for a change of venue, & subsequently filed his motion to set aside & vacate the order made by Judge Laughlin appointing Judge Burton to hear & determine the defendant's application for a change of venue & to try & determine the cause. This motion was denied, & properly denied. Section 1881, R. S., 1879, fully authorized the making of the order which the defendant sought to have set aside. Judge Burton by that order being clothed with jurisdiction, retains that jurisdiction until the final determination of the cause. This is what the statute says in express terms, & so it was ruled when this cause was here before. (State vs. Hayes, supra.)

It follows from these premises that the withdrawal of the de-
135 fendant's application for a change of venue did not divest Judge Burton of the jurisdiction with which he became invested in consequence of the order in that behalf previously made.

2. The second point is equally clear. Section 1902 *in* valid, & not obnoxious to any objections on the score of being unconstitutional. It is not a special law, because it applies to all cities having a population of over one hundred thousand inhabitants; applies as well to the future as to the present, & in this is plainly distinguishable from the "notary act" discussed in State ex rel. Harris vs. Herman, 75 Mo., 340.

Nor does the section in question impinge upon the constitutional rights of the defendant by reason of giving the State the right, in certain localities, of peremptorily challenging a larger number of persons that it possesses in other localities. Such power, on the part of the State does not, under the very terms of the section, diminish a defendant's right to the same number of challenges which he possesses alike in the cities or in the country. If the section under discussion had deprived a defendant when tried in a certain locality of the usual number of peremptory challenges, a different question might have been presented, one not necessary to be now considered. This subject of the right of the State & of defendant to peremptory challenges is fully discussed by a learned author & the cases which he cites. (1 Bishop, Crim. Prac., sec. 940, & cas cit.) The views here expressed are in accord with those authorities. Having discussed the only errors of which complaint is made, & finding them unfounded, it remains but to say that the judgment is affirmed, & to order that the sentence of the law be carried into execution. All concur.

T. A. SHERWOOD.

And afterwards, to wit, on the 8th day of March, A. D. 1886, the following further proceedings were had in said cause, to wit:

136 THE STATE OF MISSOURI, RESPONDENT,
vs.
JOHN HAYES, APPELLANT.

This day there is presented to the court a writ of error to reverse the judgment in the above cause, and a citation directed to the said respondent, citing and admonishing it to be and appear at a Supreme Court of the United States on the second Monday of October next. Thereupon it is ordered that a supersedeas be granted staying all further proceedings upon the judgment and sentence until the determination of this cause in the Supreme Court of the United States.

STATE OF MISSOURI, *sct:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, do hereby certify the above and foregoing to be a full, true, and complete transcript of the record and proceedings of the above-entitled cause as fully as the same remains on file and of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court. Done at office in the city of Jefferson, State aforesaid, this 25th day of August, A. D. 1886.

[SEAL.]

HENRY W. EWING, *Clk.*,
By H. Y. SHERWOOD,
Dep. Clk.

(Indorsement on cover:) No. 1261. John Hayes, plaintiff in error, vs. The State of Missouri. Missouri supreme court. Filed October 26, 1886.

120-68

FILED.
DEC 29 1886
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

JOHN HAYES,
Plaintiff in Error,

vs.

THE STATE OF MISSOURI,

No. 1261.

(In Error to the Supreme Court of the State of Missouri.)

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR.

Jeff. Chandler

JAMES L. McKINNIS,

Of Counsel for Plaintiff in Error.

Pierce Bros., Brief Printers, 519 Pine street, St. Louis.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

JOHN HAYES,
Plaintiff in Error,

vs.

THE STATE OF MISSOURI,

No. 1261.

(In Error to the Supreme Court of the State of Missouri.)

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR.

At the October Term, 1881, of the St. Louis Criminal Court of the City of St. Louis, State of Missouri, John Hayes, plaintiff in error, was indicted by the grand jury of said city for murder in the first degree, for shooting and killing one Phillip A. Mueller, at said city and state, on the 26th day of August, 1881. He was subsequently tried and convicted on said charge of murder in the first degree. He appealed to the Supreme Court of the State, which reversed and remanded the case for a new trial. Afterwards, to-wit: At the January Term, 1885, of said court, the plaintiff in error was again tried and convicted of murder in the first degree, from which verdict and judgment of the court he again appealed to the Supreme Court of the State, which court at the Octo-

ber Term thereof A. D., 1885, affirmed the judgment of the lower Court.

And afterwards, on the petition of plaintiff in error, a writ of error was granted in said cause by the Hon. Samuel F. Miller, one of the justices of this honorable court, returnble to the October Term thereof A. D. 1886.

On the last trial of said cause in the St. Louis Criminal Court, and also in the Supreme Court of the State of Missouri, as appears by the record, the validity of section 1902 of the Revised Statutes of the State of Missouri (vol. 1, 1879) was drawn in question, as being repugnant to section 1, article 14, of Amendments to the Constitution of the United States; and the decision and judgment of the said said St. Louis Criminal Court, and also of the Supreme Court of the State of Missouri, were in favor of the validity of the said statute law of the State of Missouri, as not being repugnant to the Constitution of the United States, nor to the amendment aforesaid.

The decision on the validity of said statute was necessarily involved in said cause, as being repugnant to section 1, article 14, of Amendments to the Constitution of the United States. And the Supreme Court of the State of Missouri, as appears from the record and from the decision of said court, could not have given the judgment which was rendered by said court without deciding the question aforesaid.

THE QUESTION INVOLVED.

Volume I, Section 1902, R. S. of Missouri (1879), provides that in all prosecutions for capital offenses, the state shall be entitled (throughout its whole territory) to but eight peremptory challenges, except that, in all cities having a population of over one hundred thousand inhabitants, the state shall be entitled to *fifteen* peremptory challenges.

The plaintiff in error contends that this section of the statute is unconstitutional, in that it violates Section I, Article 14 of Amendments to the Constitution of the United States,

which declares that no state shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Was not the defendant, Hayes, although residing and tried in a city having over one hundred thousand inhabitants, (to-wit: The City of St. Louis), within the jurisdiction of the State of Missouri? And was he not deprived of the equal protection of its laws by being denied an advantage which the law would have extended to him had he been tried in any other part of the State?

In re Jilz, 3rd Mo. Appeal, Rep., page 243.
State v. Hayes, 81 Mo. Rep., page 586.

In the Jilz case, the Court of Appeals decided that the law making the term of imprisonment for the crime of abortion, when committed in the City of St. Louis, less than it was by the general law of the state, was unconstitutional and void, although the law as applicable to the City of St. Louis, was in favor of the accused—that such a statute was in contravention of the "law of the land," which the court interpreted to mean a general public law, operating equally upon every member of the community, (*id. est.*, the State); that every partial law, by which the rights of individuals are abridged or taken away, is held by the courts to be void, as being in violation of this "law of the land," and that the meaning of the phrases, "the law of the land" and "due process of law" is identical.

"A law which should prescribe death as the punishment of murder in one county, and imprisonment as the penalty for the same crime in other parts of the State would be *void*, because not operating equally upon all the inhabitants of the State."

In the Hayes (the present) case, above referred to (page 586), Judge Sherwood, in delivering the opinion of the court, says that "no one would claim that the Legislature could pass a law for changes of venue, which should be gen-

eral throughout the state, with a provision that none of its benefits should be enjoyed by the citizens of St. Louis."

"Such a law would be in violation of section 1., of the 14th Amendment of the Constitution of the United States, which forbids any state to deny to any person within its jurisdiction, the equal protection of the laws." And would not a law, general throughout the state, be equally unconstitutional which should discriminate between the inhabitants of cities or counties in the matter of peremptory challenges, on the mere ground of an arbitrary standard of population, the outgrowth of temporary causes, alike uncertain and fluctuating?

By the ancient common law "the King might challenge peremptorily as many as he thought fit, of any jury returned to try any cause in which he was a party."

This was changed in A. D. 1305, under 33 Edw. 1., Stat. 4, so as to require those that "did sue for the King" to give some reason for their challenges; but, says Hawkins, the courts leaning to the crown, rendered this statute almost nugatory by *construction*."

Bishop, Crim. Procedure, Vol. 1, page 937.

"A statute may limit the number of grand jurors below twenty-three, if it provides for the concurring twelve, because the smaller the number among whom the twelve are to be found the more secure is the defendant against being indicted," (or convicted), *ibid*.

"On the other hand, in principle, if it allows of more than twenty-three jurors, and permits an indictment to be found on the vote of twelve, it increases his danger, and is consequently *unconstitutional*."

1st Bishop, Crim. Procedure, page 855.

Will it be seriously claimed that the legislature can, under the pretext of legislating for a "class of persons or things," pass a law granting to the residents of all or certain cities and counties, having a given population, the right to one or more peremptory challenges, and denying the same

right to all other persons, increasing or decreasing the number of the State's peremptory challenges according to the population of the place where the defendant may happen to live, or be tried; thus enacting a different and conflicting system of laws, of taxation—for example, for each separate city and county of the State?

The right of the law making power to discriminate between cities or counties having a recognized number of inhabitants and those having less, in the matter of peremptory challenges, whether by the State or the defendant, implies the right to deny either or both the privilege of challenge altogether.

To concede this, and it must be conceded, if the position of the respondent on the question be correct, is to ignore and set aside the constitutional provision which guarantees to every person accused of crime a public trial by an impartial jury of the vicinage, because the right of challenge is absolutely essential thereto, as is attested by the laws and experience of all civilized nations.

Deny the right of challenge, or unreasonably limit or unjustly apportion it, and an impartial jury is an impossibility.

"You take my house, when you do take the prop
That doth sustain my house. You take my life,
When you do take the means by which I live."

If the Legislature had the right to increase the state's peremptory challenges from eight to fifteen, in all cities having over one hundred thousand inhabitants, it had the right to increase the number to fifteen hundred, to increase it indefinitely, and, by a parity of reasoning, they had the right to reduce the defendant's peremptory challenges from twenty to one—to nothing!

"Is this the law of the land?"

To quote the trenchant language of Judge Sherwood on this subject, in delivering the opinion of the court in the case of the State, *ex rel.*, Harris v. Hermann (75 Mo. Rep., page 352): "Courts of justice can not permit constitutional pro-

hibitions to be evaded, by dressing up special laws in the garb and guise of general statutes."

On the day of the trial of this defendant, had the City of St. Louis contained, according to the census, but just one hundred thousand people, the State would have had but eight peremptory challenges, thus adding to the security of the defendant, and increasing his chances of acquittal. Whereas, by adding only one to that number of its inhabitants, the state became entitled, under the provisions of section 1902, R. S., to fifteen peremptory challenges, thereby giving the prosecution an undue advantage, and increasing the state's facilities for conviction, while correspondingly enhancing the peril of the defendant. To be doomed to stand forever under the sword of Democles, were merciful, indeed, compared with a fate like this, if such be the "law of the land."

More than this: The plaintiff in error asserts that every additional peremptory challenge granted the state by this exceptional law, which applies only to cities having a given population (St. Louis being the only city in the state having one hundred thousand inhabitants), and forming but an insignificant part of the state's territory, subtracts, by indirection, an equal number from those (20) accorded to the defendant.

Admit that section 1902 grants to every defendant throughout the state (the City of St. Louis included), an equal number (20) of peremptory challenges, yet, he is deprived of this advantage, if tried in a city having over one hundred thousand inhabitants, to the extent of the increase of the State's peremptory challenges, allowed in such cities alone.

Could the State reduce defendant's peremptory challenges in prosecutions for murder to a number less than twenty in cities having a population of over one hundred thousand, while granting that number to all the other inhabitants of the State outside of those cities?

What difference does it make whether the defendant's peremptory challenges in these exceptional places be decreased

in number, if the State's challenges are enlarged to a degree which deprives him of all real benefit?

The general law gives to the defendant twenty peremptory challenges in all capital cases, independently of population or place of trial. But concede to the legislature the right (which it has exercised in this matter) to abitrarily increase the number of the State's peremptory challenges to one hundred—to one thousand, or indefinitely. Is not the defendant's only safeguard, the right of peremptory challenge, thereby practically nullified?

And is he not thereby denied the "equal protection of the laws," by, at least, an abridgment, if not an absolute denial of the means recognized as necessary to his protection, for the obtaining of an *impartial* jury, in a trial involving his life?

By this statute the prosecution is primarily permitted to set aside fifteen, it may be, of the very best men on the panel, some of whom the defendant might prefer as jurors to try his cause, thus depriving him of his right of choice to at least seven qualified jurors to which he would be entitled under the equal operation of the general law—"the law of the land."

Generally and necessarily, an enlargement of the number of peremptory challenges allowed the State in capital cases detracts from the advantages of the accused, and magnifies his danger, while, at the same time, it multiplies the chances of the State for conviction. And while the State may prescribe by law the relative number of peremptory challenges granted to either party in criminal prosecutions, such a law, as intimately affecting the administration of justice, must, to be valid or constitutional, operate equally upon every citizen of the State.

In re Jilz, 3 Mo. Appeal Rep., page 246.

What would be thought of a law which should allow the State one hundred or one thousand peremptory challenges, and the defendant but one, or none; whether in the State at large or in certain designated localities? Would not such a

law be tantamount to a denial of "equal protection" to persons residing within its jurisdiction?

So that, had a change of venue been granted, or had the defendant been tried in any city happening to have less than one hundred thousand inhabitants, his chances of acquittal would have been enhanced, and the chances for his conviction diminished—his rights being, to that extent, protected and enforced under the general law—whereas, subjected to the operation of this local, partial and odious statute, which acts unequally even on the same individual according to the place of trial, he has been denied the common justice accorded to every other citizen of the State, and his life imperiled by mere accident of his temporary domicile.

If this be sanctioned, what becomes of the fundamental principle that "the law must operate *equally upon every member of the community*"—not upon those living in one or more integral parts of the State, having a larger or smaller population, but upon every citizen of the State—and of the other principle, the correlative of the first, that "every partial law, by which the rights of individuals are abridged or taken away, is void," as being in violation of the "law of the land."

3 Mo. Appeals, page 246.

The right of challenge is a common law-right, as old as the law itself.

Chitty Crim. Law, page 534.

It is essential to the protection of every citizen, of every person charged with crime. Without it, a judicial trial would be a farce, the administration of justice a solemn mockery.

It may be argued that the question raised here is analagous to that already decided by this court in the case of the State of Missouri, *ex rel.* Frank J. Bowman, plaintiff in error, (to the State of Missouri) v. Lewis, *et al.*

It is respectfully submitted, however, that the resemblance is but seeming, as a critical comparison of the facts and the

law in both cases will make manifest.

The plaintiff in error, therefore, contends that the decision of the Supreme Court of the State of Missouri, the respondent herein, is erroneous, and should be reversed and the case remanded.

~~JAMES L. MCHAFFIE~~ Jeff. Chandler

Of Counsel for Plaintiff in Error.

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No. 1261.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

JOHN HAYES, - - - *Plaintiff in Error*,

vs.

THE STATE OF MISSOURI, - *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

B. G. BOONE, Attorney-General,
For Defendant in Error.

—IN THE—

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

No. 1261.

JOHN HAYES, PLAINTIFF IN ERROR.

vs.

THE STATE OF MISSOURI, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT OF DEFENDANT IN ERROR.

The plaintiff in error, John Hayes, was convicted in the criminal court of the city of St. Louis, in the State of Missouri on the 13th day of January, 1885, of murder in the first degree (*vide* printed transcript of record, top p. 18) for shooting and killing one Philip A. Mueller.

Upon appeal to the Supreme court of the State of Missouri at its October term, 1885, the judgment of the criminal court was affirmed (*vide* printed transcript of record, top page 3). Thereupon plaintiff (Hayes) brought his case to this court by writ of error.

Plaintiff alleges in his motion for a new trial, (*vide* printed transcript, § 12 of motion, top page 74,) that § 1902 of the Revised Statutes of Missouri of 1879 is violative of and inconsistent with section one (1), article fourteen (14), of the amendment to the constitution of the United States, and upon this alone assigns error.

Section 1902 of the Revised Statutes of Missouri of 1879, is as follows:

"SEC. 1902. *State's challenges.*—In all criminal trials the State shall be entitled to the following number of peremptory challenges, viz: In cases specified in the first clause of section one thousand nine hundred, eight; in cases specified in the second clause of said section, six; and in all other cases, four, except in all cities having a population of over one hundred thousand inhabitants the State shall be entitled to the following number of peremptory challenges, viz: In cases specified in the first clause of said section, fifteen; in cases specified in the second clause of said section, ten, and in all other cases, four."

Section one (1) of article fourteen (14) of the constitution of the United States, which it is claimed by plaintiff in error, is violated by the foregoing statutory provision, is as follows:

Sec. I, Art. XIV Con. U. S.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

BRIEF.

I.

CONSTITUTIONAL CONSTRUCTION.

A constitutional provision should be construed so as best to subserve the objects for which it was made.

N. Riv. S. Co. vs. Livingston, 3 Cow., 713.
Hayne vs. Powers, 39 Barb., 427.
Met. Bank vs. Van Dyck, 27 N. Y., 400.

Words should not receive a technical but a practical construction.

Ry. Co. vs. Penniston, 18 Wall., 5.
Priggs vs. Com., 16 Peters, 539.
Passenger Cases, 7 How., 282.
Martin vs. Hunter, 1 Wheat., 304.

II.

CONSTRUCTION OF STATE STATUTE.

Section 1902 Revised Statutes of Missouri is not a special law, Plaintiff in error was not denied the equal protection of the law by reason of its existence.

State *ex rel.* Lionberger vs. Tolle, 71 Mo., 650.
State *ex rel.* Harris vs. Hermann, 75 Mo., 340.
Rutherford vs. Heddens, 82 Mo., 388.

Vide opinion of Missouri Supreme Court in this case, State vs. Hayes, pp. 3 and 4 of printed transcript.

III.

PEREMPTORY CHALLENGES OF JURORS UNDER LEGISLATIVE CONTROL.

Thompson and Merriam on Juries, § 165.

Stokes vs. People, 53 N. Y., 164.

Walter vs. People, 32 N. Y., 147.

Com. vs. Walsh, 124 Mass., 32.

Hartzell vs. People, 40 Penn. St., 462.

Jones vs. State, 1 Ga., 610.

Boon vs. State, 1 Ga., 618.

Hudgins vs. State, 2 Ga., 173.

State vs. Wilson, 48 N. H. 398.

Com. vs. Dorsey, 103 Mass., 412.

ARGUMENT.

Plaintiff assigns for error that § 1902, Revised Statutes of Missouri, *supra*, is unconstitutional in that it is violative of § 1, article 14 of the Constitution of the United States. Its unconstitutionality is alleged to consist in this: that it provides that in cities of more than one hundred thousand inhabitants the prosecution shall be entitled to seven peremptory challenges more than in other sections of the State.

A statement of the ancient common law practice in regard to peremptory challenges of jurors and the rule established in reference thereto by subsequent statutes of England and the various States and territories in this country, as well as the construction placed upon them by the courts, is necessary to clearly determine whether said section (1902, R, S. Mo., *supra*,) is constitutional or not.

By the ancient common law the King might challenge peremptorily as many jurors as he pleased. Coke Lit., 156. And under the statute, 33 Edwd. 1st, Stat. 4, the prosecuting officer when he challenged a juror does not assign his cause until the whole list has been gone through with, and if a full jury can be obtained without recalling those who have been set aside the cause of challenge is not assigned. A prosecutor thus exercises a peremptory challenge which is practically unlimited.

2 Hale, P. C., 271.

4 Bl. Com., 353.

Mansell vs. Queen, 8 El. & Bl., 54 and 103.

Reg. vs. Frost. 9 C. & P. 129 and 136.

Rex. vs. O'Coigly, 26 How. St. Tr., 1231.

In the Federal courts in this country the right of peremptory challenge is regulated by statute.

U. S. Statutes 1878, § 819.

In nearly all of the States and territories the right of peremptory challenge, both on the part of the prosecution and the accused, is regulated by statute. In States where the right of peremptory challenge is not expressly conferred by statute, the English practice, above referred to, is regarded as the common law of the country.

Whar. Am. Cr. L., 4th Ed,, § 2956.

1 Bish. Cr. Pro., 2d Ed., § 939.

The practice of unlimited peremptory challenge is exercised wherever there is not an express statute, and its constitutionality has never been questioned.

The constitutionality of statutes regulating challenge, when questioned, has uniformly been upheld.

Warren vs. Com., 40 Penn. St., 462,

Walston vs. Com., 16 B. Monr. (Ky.), 15.

Jones vs. State, 1 Kelley (Ga.), 610.

Boon vs. State, *Ib.*, 618.

Hudgins vs. State, 2 Kelley (Ga.), 173.

State vs. Hayes (Mo.), this case, pp. 3 and 4 printed transcript.

In other States, where the subject has not been expressly passed on, the validity of such statutes has been recognized or assumed by the courts.

Schoeffer vs. State, 3 Wis., 823, 837 and 838.

Wiley vs State, 4 Blackf. (Ind.), 458.

Beauchamp vs. State, 6 Blackf. (Ind.), 299.

Fouts vs. State, 8 Ohio St., 98–104.

State vs. Arthur, 2 Dev., 217.

State vs. Benton, 2 Dev. and Bat., 196–203.

From the foregoing it will be seen that peremptory challenges are wholly under legislative control, and that it is entirely competent for legislatures to declare that either the State or the accused, or both, may exercise challenges without assigning cause and to limit the number of them.

The main purposes and object of the fourteenth amendment to the Federal constitution was, first, to establish the citizenship of the negro; and second, to define what constituted citizenship of one of the States.

The second clause of the amendment protects from the hostile legislation of the States the privileges and immunities of citizens of the States.

Slaughter House Cases, 16 Wall., 36.

It is submitted that the statutory section complained of (§ 1902 R. S. Mo., *supra*,) is not violative of any of the provisions of this amendment.

This section (§ 1902, *supra*,) does not restrict or limit the rights or privileges of a defendant when tried in a city of over one hundred thousand inhabitants, but gives him the same number of peremptory challenges there as elsewhere in the State.

The effect of this section is simply to increase the panel from which the trial jury is selected from forty to forty seven, allowing the State seven more challenges in cities of one hundred thousand inhabitants than in other sections of the State.

The law, organic or statutory, only requires that a defendant shall be tried by an impartial jury of twelve of his peers, and so far as the manner or mode of procedure of their selection is concerned it is immaterial.

Thus it will be seen that a defendant, under the statutory section in question, has the right to the same number of challenges in one part of the State as another. He is not, by its provisions, denied the equal protection of the law, and it is submitted that there is no error herein justifying a reversal.

B. G. BOONE,
Attorney-General of the State of Missouri,
For Respondent.